Supreme Court, U.S.
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No.

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In the
Supreme Court of the United States

WILLIE L. GLENN (as Personal Representative of the Estate of Lester Zachary), and KAREN ZACHARY (Individually, and As Next Friend of Lester Zachary),

Petitioners,

v.

CITY OF COLUMBUS, GEORGIA/CONSOLIDATED GOVERNMENT OF COLUMBUS, GEORGIA, RICHARD BOREN (Individually, and In his Official Capacity as Chief of Police), GARY A. BOLEN (Individually, and In his Official Capacity), KENNETH HUDSON (Individually, and In his Official Capacity), JOSEPH COATS (Individually), Gregory Touchberry (Individually), and JOHN DOE (1-3),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

BOBBY C. ANIEKWU
GEORGIA STATE BAR NO. 019840
Counsel of Record
BOBBY C. ANIEKWU & ASSOCIATES
127 PEACHTREE STREET, N.E.
SUITE 410 - THE CANDLER BUILDING
ATLANTA, GA 30303
Bobby.Aniekwu@att.net
(404) 885-1717

Attorney for Petitioners

July 19, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

The Eleventh Circuit reversed the district court's denial of qualified immunity to four police officers Kenneth Hudson, Gregory Touchberry, Joseph Coats and Gary A. Bolen, on Petitioners' Section 1983 individual capacity excessive force claims against the police officers. The Petitioners' decedent Lester Zachary, was shot by CPD officers on his chest and center mass spleen area while standing on the front porch of his home, with beanbag munition rounds that were deployed from close quarters and, died in a local hospital two days later from his sustained wounds. In denying qualified immunity to the officers, the district court found that genuine issues of material fact existed as to whether Hudson, Coats and Touchberry had arguable probable cause to use deadly force against Zachary; that the law at the time of the shooting clearly established that deadly force is not permitted unless the officers have probable cause to use deadly force; that there is a causal connection between Bolen's training of Coats and Zachary's injury because, there is a fact question as to whether Coats targeted Zachary's spleen or center mass even though deadly force was not warranted.

On interlocutory appeal by the officers on qualified immunity grounds, the Eleventh Circuit Court of Appeals Panel concluded that "[O]n April 4, 2005, there were no cases in the relevant jurisdictions on the use of less than deadly force (here a beanbag munition) to subdue a suspect who had threatened to shoot at officers who were in front of his house, spoke about killing children, and threatened suicide." The Panel opined that "as for the case law, 'we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances,'" and concluded that "there was no clearly established law at the time that would have put officer Coats and Sergeants Hudson and Touchberry on notice that the use of a beanbag munition in these circumstances violated the Fourth Amendment."

The Eleventh Circuit Panel further held that the beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and that "[T]he case law from the relevant jurisdictions teaches us nothing about safe distances for shooting a beanbag gun," and thereby, granted qualified immunity to officer Bolen. In so holding, the Eleventh Circuit's decision directly conflicts with the binding precedents of this Court, and the holdings of the Sixth, Ninth and Tenth Circuits, and accords only with the Fourth Circuit. Furthermore, in holding that the use of beanbag in this case did not constitute deadly force, the Eleventh Circuit improperly exceeded its interlocutory appellate jurisdiction which was limited, with regard to qualified immunity issue, to consideration of only questions of law, and not to make its own factual findings.

Three questions are presented:

(1). Whether the Eleventh Circuit Court of Appeals misconstrued the nature and/or scope of precedents that should be considered to determine the existence of "clearly established" law in light of this Court's holding in ***Pearson v. Callahan, 129 S.Ct. 808 , 822-23, 172 L.***

Ed. 2d 565 (2009), by limiting itself to consideration of only United States Supreme Court, Eleventh Circuit and, the host state's supreme court decisions, and thereby conflicts with the Sixth, Seventh, Ninth and Tenth Circuits which hold that the body of case law from out of circuit federal courts and supreme court decisions should be considered as well in determining existence of clearly established right or law.

(2). Where the district court made factual findings that the officers' shooting of Zachary with a beanbag constitutes application of deadly force, did the Eleventh Circuit exceed its interlocutory appeal jurisdiction by setting aside the district court's factual findings and holding that the beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and thereby conflicts with the Fifth, Sixth and Seventh Circuits which hold that such district court factual finding is beyond the circuit court's jurisdiction to review.

(3). Whether the Fourth Amendment law against warrantless searches, arrests/seizures and, ***Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 369 (1980)** are violated when, officers coerce a suspect to come outside his home under threat of immediate force only to shoot and arrest the suspect, without a warning, warrant, exigent circumstances, or consent, when the suspect steps outside on his porch in obedience to the police officers' command.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case entered on April 20, 2010.

OPINIONS BELOW

The Per Curiam opinion of the Eleventh Circuit Court of Appeals whose review is sought is reproduced in the Appendix A at 1a to 17a. The Order of the United States District Court in which it Denied summary judgment to defendant officers on qualified immunity grounds, is unreported, and is reproduced in the Appendix to this Petition ("Appx. A") at 18a to 65a. The Order of the United States District Court in which it Granted summary judgment on Petitioners' remaining claims, is unreported, and is reproduced in the Appendix to this Petition at 66a to 70a.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this Court. The Per Curiam opinion of the Eleventh Circuit court of appeals was entered on April 20, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1). The present Petition for Writ of Certiorari is filed within Ninety (90) days of the Opinion of the court of appeals reversing the Order of the district court below, and is timely pursuant to 28 U.S.C. § 2101(c) and Rules 10(1)(a) & (c) of the Rules for the Supreme Court.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are *U.S. Const. amend. IV.* and *42 U.S.C. § 1983*.

1. The ***Fourth Amendment to the United States Constitution***, incorporated to the States by the ***Fourteenth Amendment***, provides:

> **"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."**

2. *42 U.S.C. § 1983* provides, in relevant part:

> **"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ..."**

STATEMENT OF THE CASE

I. Background Facts and Issues

This case arises from the unprovoked shooting and killing of an unarmed man, Lester Zachary ("Zachary"), on April 4, 2005 while standing on his front porch by Columbus Police Department ("CPD") officers, Joseph Coats ("Coats"), Sergeant Kenneth Hudson ("Hudson"), Sergeant Gregory Touchberry ("Touchberry") and Officer Gary Bolen ("Bolen"). At about 3:00 a.m. on April 4, 2005, Zachary, a 45 year old army veteran who was diagnosed with post traumatic stress disorder contacted the Veterans Administration ("VA") Dayton, Ohio 911 hotline to request help with dealing with nightmares he was having about children he may have killed during the war. He reported that the dreams had returned after one year of not having them. Zachary also requested that the VA not send police officers to his house and threatened to shoot them if they did. However, the VA contacted CPD and requested they go to Zachary's residence to render assistance. The CPD despatch relayed the information received from the VA 911 over the police radio, and advised all officers that Zachary was suicidal, homicidal, had weapons, and was to be approached with caution. About eight officers swarmed Zachary's residence and, surrounded the ranch style property where Zachary resided with his female acquaintance, Helen Stephens ("Stephens").

Also, during that early morning, Zachary's fourteen (14) year old daughter, who was visiting with him for the high school spring break weekend was asleep in one of the rooms. When the police arrived Zachary refused to go outside out of his stated fear that he would be arrested. However, Zachary and Stephens maintained telephone dialogue with the CPD despatch, during which Zachary warned the CPD 911 despatch, "Look here, ma'am. You tell these guys in front of my door, I'm... going to start shooting. I'll start shooting..... get these guys out of my door, man...." However, Stephens assured the despatch supervisor, Ms. McDaniel ("McDaniel") that they did not possess or own any weapons, there were no guns anywhere in their house, and that Zachary was drunk and had neglected to take his mental health medication. McDaniel immediately despatched to the hearing of all officers that there were no guns in the house, and that it was a "psychiatric problem."

McDaniel then advised Zachary to look outside and observe the sea of blue lights outside his home, and pressed him to go outside and talk to the police to prove that he did not have harmful intentions towards them. She also announced to all officers that Stephens was going to open the door "for ya'll to come in," and; that Zachary had calmed down. Meanwhile, Hudson arrived at the scene and took command. McDaniel explained to Hudson that Stephen was going to open the front door and secure the dog so the officers could come in and talk to them. Stephens assured McDaniel that she did not feel threatened; that Zachary was not threatening her or "the baby;" and McDaniel told her that someone needed to go outside and convey that information to the police. At this time, Zachary and Stephens walked outside and stood on their front porch, but no officer agreed to go up to the porch and meet with them. Zachary then went back inside the house to continue to speak with the CPD despatch.

Thereafter, Zachary went in, to and from the house, at least three or four separate times with his hands up in the air and stood on his porch, and each time waved his both arms in the air and pulling his tee-shirt up and announcing, "I don't have a gun!!" and "look y'all I don't have no weapons." He also kept demanding for the officers to "get off my property, get off my property, ya'll get off my property" as he stood on the porch. Zachary did not make any threats at any officer. No officer present saw any weapon in his hands each time Zachary emerged from the house. No one observed him point any kind of object at the police, or make any threatening gestures, yell threatening or curse words, or observed Zachary approach the officers in a threatening manner. Most officers present agreed the situation was not a hostage incident or one that warranted the use of deadly force. Yet, the CPD made no effort to obtain a warrant to enter the house and arrest Zachary and, although, there was a 14 year old child inside the house, no officer went into the house after Zachary's shooting to check on her condition. Zachary's house was surrounded by eight officers and, he could not have fled or escaped.

When Zachary emerged with Stephens from the house the third time, Stephens left the porch and walked across their front lawn to the street curbside to speak with Hudson. Stephens again advised Hudson that there were no guns in the house; she did not feel threatened; that Zachary was not threatening her or "the baby;" that Zachary was drunk and failed to take his medicine but, had calmed down. After speaking with Hudson, Stephens returned to the porch, and they both went back into their house. However, before they retreated into the house this time, Zachary announced to the officers that as far as he was concerned the matter was over with and that he was going to bed, and shut the door behind them.

Annoyed that Zachary went back into the house, the sergeants instructed Coats, a military-trained marksman, sharpshooter, and a member of CPD's initial team of officers to be trained on the use of beanbag munition, to position himself about 21 feet from the east side of the porch on the driveway, and to shoot Zachary with the beanbag rounds if he reemerged from the house. None of the officers warned Zachary that he would be shot if he failed to comply with any instructions of the police officers. Instead, Hudson yelled out Zachary's name loudly and, commanded him to come outside. When Zachary, in obedience to the police command came outside, Hudson and Touchberry ordered Coats to shoot Zachary. Coats shot Zachary twice with beanbag rounds, at close range (21 feet) and, with deadly force sufficient to shatter his spleen. Coats, deposed that he was aiming at Zachary's upper shoulder, but instead hit him once on his spleen area, and a second time on his left chest. Significantly, Coats deposed that they decided to shoot Zachary because they did not want him to go to bed and leave them outside. Two days later, Zachary died at a nearby hospital.

II. The District Court Decision

On April 3, 2007, Petitioners filed a Complaint in the district court against the officers and City of Columbus for multiple federal and state law claims which included unlawful use of excessive force and, for Bolen failing to properly train and supervise the offending officers on the appropriate use of deadly force. On December 2, 2008, the district court entered an Order denying the City's and officers' summary judgment motion on Plaintiffs' excessive force claims based on qualified immunity. The district court held that "genuine issues of material fact exist as to whether Hudson, Coats and Touchberry had arguable probable cause to use deadly force against Zachary." With regard to officer Bolen, the district court held that "..... a jury could conclude that he trained officers to aim the beanbag ammunition at the center mass even when deadly force was not warranted because he told them to target the center mass at distances of twenty to forty feet but did not adequately warn them of the consequences of targeting the center mass from that distance." ***(Appx. B & C)***.

III. Decision of the Eleventh Circuit Court of Appeals

Under the authority of ***28 U.S.C. § 1292(b)***, Defendants petitioned the Eleventh Circuit Court of Appeals for leave to file an appeal of the district court's denial of qualified immunity protection to the officers and, the City of Columbus. By an Order entered February 23, 2009, the Eleventh Circuit granted the officers' petition for leave to appeal but denied the City of Columbus' similar petition for leave to appeal. On April 20, 2010, the Eleventh Circuit Court of Appeal entered an Order Reversing the district court's denial of summary judgment to the officers on qualified immunity grounds. ***(Appx. A)***.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Eleventh Circuit's April 20, 2010 opinion should be reviewed by this Court because it involves questions of great importance that has created much conflicting opinions among the circuits, as to the proper scope of analysis to determine when a right is "clearly established" in view of this Court's holding in ***Harlow* v. *Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)***. Erroneously, the Eleventh Circuit overruled the district court to make the appellate finding that use of beanbag munition did not constitute deadly force, and that Zachary caused his own fatal shooting by the officers because he was allegedly ".... ranting, raving, and yelling" at them to leave his premises, and that Zachary was believed to possess a loaded gun, despite plethora of district court factual findings to the contrary. See **(Appx. A at 47a)**.

Indeed, the Panel's opinion ignores this Court's well-established "totality of circumstances" precedent of ***Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)***, and its own precedent that shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others constituted an unreasonable search and seizure and clearly violated fourth amendment law. ***Lundgren v. McDaniel, 814 F.2d 600, 603 (11th Cir. 1987)***.

Further, the Eleventh Circuit's opinion sidestepped this Court's important holding in ***Pearson v. Callahan, 129 S.Ct. 808 , 172 L. Ed. 2d 565 (2009)***, that accused police officers were entitled to rely on the body of case law from three out of circuit federal circuits and two state supreme courts, to find that the "consent-once-removed" doctrine was clearly established law even though the question had not been addressed by the deciding circuit. Thus, Petitioners respectfully submit that there are four reasons why this Court should grant their petition for writ of certiorari and review the Eleventh Circuit Court of Appeal's decision.

First, as the Eleventh Circuit and other circuits have recognized, there are distinct split of opinion among the circuit courts of appeal as to the nature and scope of precedents a Court must consider in determining whether a right is clearly established. Second, the ruling by the Eleventh Circuit conflicts with this Court's precedent authorizing Courts to examine the entire body of case law, including out of circuit cases, to determine whether a law is clearly established. Third, there is a distinct split of opinion between Eleventh Circuit and the Fifth, Sixth and Seventh Circuits with regard to reviewability of the factual findings of the district court, as to whether the shooting of beanbag munition rounds at a victim by police officers constitutes deployment of deadly force. A review of the Eleventh Circuit decision is appropriate to consider whether out of circuit decisions should be evaluated to clearly establish a right in light of ***Pearson v. Callahan***. Fourth, there is a conflict between the Eleventh Circuit and this Court's precedent, as well as the Sixth, Ninth, Tenth Circuit Courts of Appeal and, a district court, as to whether in the undisputed absence of exigent circumstances, ***Payton*** is violated when officers command a suspect to come outside his home under threat of force and, then shoot and arrest the suspect without any warning or a warrant.

I. THE CIRCUITS ARE SPLIT

In determining whether the "clearly established" requirement is met, there is an acknowledged split among the Circuits on whether out of circuit body of case law should be considered by Courts of Appeal. Initially, this Court did not clearly delineate what nature of precedents was necessary to constitute a "clearly established" right. ***See Ohio Civil Service Employees Association v. Seiter, 858 F.2d 1171, 1175 (6th Cir.1988).*** Thus, the number and nature of precedents necessary to "clearly establish" a right varies throughout other circuits, and sometimes even within a circuit. ***Cf. Ward v. County of San Diego, 791 F.2d 1329, 1333 (9th Cir.1986), cert. denied, Duffy v. Ward, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987); Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir.1985)*** (in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established); ***Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991)*** (a law enforcement officer cannot be held to a standard of conduct unsettled by the Supreme Court, 11th Circuit, or highest state courts in the circuit); ***Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988)*** (to be clearly established a question must be decided either by the highest state court in the state where the case arose, by a United States Court of Appeals, or by the Supreme Court). For some courts, the nature of the precedents required seemed to vary depending on the nature of the right asserted. ***See Ohio Civil Service, 858 F.2d at 1177.***

A. The Eleventh Circuit (In the Present Case) and the Fourth Circuit have held that in determining whether a constitutional right was Clearly Established at the time of the claimed violation, Courts need not look beyond the decisions of the Supreme Court of United States, their own court of appeals, and the highest court of the state in which the case arose.

In the Eleventh Circuit decision that petitioners ask this Court to review, the court opined that "As for the case law, 'we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances." ***(Appx. A at 9a)***. This position represents the narrowest view in the interpretation spectrum, and reaffirmed the Eleventh Circuit's long held view that it places little or no value on the opinions of other circuits in determining whether a right is clearly established. See, ***Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991)*** (a law enforcement officer cannot be held to a standard of conduct that is unsettled by the Supreme Court, 11th Circuit, or highest state courts in the circuits); ***Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990)*** (to decide a clearly established right, court looks to the law established by the Supreme Court, the courts of appeals, and the district courts).

The Fourth Circuit employed a similar interpretation in ***Edwards v. City of Goldsboro, 178 F.3d 231, 251 (4th Cir. 1999)***, when it opined that "In determining whether a [constitutional] right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose." Similarly, in ***Wilson v. Layne, 141 F.3d 111, 114 (4th Cir.1998) (en banc)*** the Fourth Circuit Court of Appeals held that "[A] law is 'clearly established' when 'the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state.'" The Fourth and Eleventh Circuits conflict with other Federal circuits and represent the narrowest interpretation of the "clearly established" right.

B. In Conflict, the Ninth, Seventh and Third Circuits have held that in the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of the state courts, other circuits, and district courts, and even unpublished decisions of district courts may inform the circuit's qualified immunity analysis.

On the other end of the "clearly established" analytical spectrum, the Ninth Circuit Court of Appeals adopted a broad view that "[I]n the absence of binding precedent, a court should look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." ***Malik v. Brown, 71 F.3d 724, 727 (9th Cir.1995)***. This circuit subsequently expanded its scope further and held that "[E]ven unpublished decisions of district courts may inform our qualified immunity analysis." ***Sorrels v. McKee, 290 F.3d 965, 971 (9th Cir. 2002).***

Likewise, the Seventh Circuit has held that

> **"When looking at closely analogous cases to determine if a right was clearly established at the time of the violation, we look first to controlling precedent on the issue from the Supreme Court and to precedent from this Circuit. In the absence of controlling precedent, we must broaden our survey to include all relevant case law in order to determine 'whether there was such a clear trend in the case law that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'"**

Estate of Escobedo v. Bender, No. 08-2365 (7th Cir. Apr. 5, 2010)[1], citing, Jacobs v. City of Chicago, 215 F.3d 758, 766 (7th Cir. 2000).

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[1] In Escobedo, the circuit court partly relied on the body of case law from other circuits to conclude that "Based on controlling precedent from this Circuit and the clear trend in the law from our sister circuits, the clearly established law as of July 19, 2005, established that the use of tear gas is unreasonable when: (1) attempting to subdue individuals as opposed to mass crowds; (2) when the individual does not pose an actual threat; (3) when the individual is not holding hostages; (4) when the individual has not committed a crime and the officers are not in the process of attempting to make an arrest; (5) when the individual is armed but merely suicidal as opposed to homicidal; (6) when the individual is not attempting to evade arrest or flee from the police......" ***Estate of Escobedo v. Bender, Id. at pp. 24-25.***

In the Third Circuit, a district court held that "[I]n an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." ***Lattany v. Four Unknown U.S. Marshals, 845 F.Supp. 262 (E.D. Pa. 1994)***. Contrary to the Eleventh and Fourth Circuits, the clear thrust of the Ninth, Seventh and Third Circuits' "clearly established" law analysis is that the Courts ordinarily look at binding precedent of this Court, their respective circuits and state supreme courts, failing of which the courts turn to the decisional laws of other circuits. This Court must resolve these conflicts on this important issue.

C. The Sixth and Tenth Circuit Courts of Appeal have held that in order for the law to be clearly established, there must be a Supreme Court of United States or, its own Circuit decision on point, and in limited circumstances, on decisions of other circuits.

The Tenth Circuit takes a more balanced approach, by holding that although the action in question does not have to have been previously held unlawful, in the light of pre-existing law the unlawfulness must be apparent. "This ordinarily means that there must be a Supreme Court or Tenth Circuit opinion on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." ***Garramone v. Romo, 94 F.3d 1446, 1451 (10th Cir. 1996); Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir.1992)***.

Similarly, the Sixth Circuit held that

> **"In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting."**

Virgili v. Gilbert, et. al., 272 F.3d 391, 393 (6th Cir. 2001). In fact, a district court in the Sixth Circuit, relied exclusively on Second, Fourth and Eighth Circuit decisional law to hold that the law was sufficiently established at the time of correctional officer's unconstitutional strip search of prison employees that the Fourth Amendment of the Constitution imposed a reasonable suspicion standard that governs strip searches of prison employees, and that suspicion to strip search an employee must be articulable, particularized, and individualized. ***Pierce v. Ohio Dept. of Rehabilitation and Corr., 284 F.Supp.2d 811 (N.D. Ohio, 2003).***

Invariably, in conflict with the Sixth Circuit, the Eleventh Circuit's decision being challenged in this petition, opined that "California case cannot provide fair warning to the officers in Columbus, Georgia because again, in this circuit, only cases from the pertinent state supreme court, the United States Supreme Court or the Eleventh Circuit can clearly establish the law." Respectfully, the California case can, and should, provide fair warning to officers in Columbus, Georgia, in our federal judicial system, especially when Constitutional rights are implicated. Interestingly, the Eleventh Circuit contradictorily recognized as much when it relied on the same California case in 2005 to deny qualified immunity to officers when it held:

> **"However, viewing the facts in the light most favorable to Mercado, we can find no indication that he made any threatening moves toward the police. *See Deorle v. Rutherford*, 272 F.3d 1272, 1284-85 (9th Cir.2001) (denying officers qualified immunity after deploying a projectile bean bag and taking out the eye of a subject who was relatively cooperative and not a threat to the officers or others)........ *See Fernandez v. Cooper City*, 207 F.Supp.2d 1371, 1377 (S.D.Fla.2002).."**

Mercado v. City of Orlando, 407 F.3d 1152, 1157-58 (11th Cir., 2005). If the 11th Circuit could rely on ***Deorle*** case in 2005 to deny qualified immunity, one wonders why it is unable to do so in 2010 under similar circumstances. Nonetheless, the Eleventh Circuit's very narrow interpretation of the "clearly established" principle is contrary to this Court's direction to courts to consider out of circuit cases in such analysis, and should be addressed and resolved by this Court.

II. THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH UNITED STATES SUPREME COURT PRECEDENT WITH REGARD TO THE SCOPE AND NATURE OF PRECEDENTS TO CONSIDER IN DETERMINING WHETHER A RIGHT OR LAW IS CLEARLY ESTABLISHED.

A. Supreme Court Precedent Directs Courts to Consider Out of Circuit Cases in Determining Clearly Established Law.

In ***Harlow v. Fitzgerald***, this Court held: "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Id. at 818.*** Initially, this Court did not clearly delineate what nature and scope of precedents were necessary to constitute a "clearly established" right. It simply held that the inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." ***Wilson v. Layne, 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)***. However, this Court explained that the reasonableness of official conduct (search or seizure) must be evaluated in context, i.e., whether the totality of the circumstances justified a particular sort of action. ***Tennessee v. Garner, Id.***. A few years after the ***Harlow*** decision, this Court clarified that for the purposes of qualified immunity analysis, "clearly established" means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." ***Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)***. For about twenty years after the ***Anderson*** decision, Courts were still issuing conflicting opinions regarding the proper analysis of the nature and scope of the body of laws to be considered in determining when a right is clearly established; on the one hand, the Eleventh and Fourth Circuits took extremely narrow view and, would not consider out of circuit case law, while the Ninth, Seventh and Third Circuits adopted an expansive view, and take into account, not just their own circuit decisions, but also, out of circuit as well as unpublished opinions in their analysis of the "clearly established" right. Meanwhile, the Sixth and Tenth Circuits pursued a "middle-of-the-road" approach, and would consider out of circuit decisions in their analysis only in limited circumstances.

Subsequently, in ***Pearson v. Callahan, Id.***, this Court provided clear guidance on the appropriate body of case law to be considered in determining whether a right is "clearly established."[2] In reversing the Tenth

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[2] In ***Pearson v. Callahan, Id.***, the respondent arrestee sued police officers who conducted a warrantless search of his house incident to his arrest for the sale of drugs to an undercover informant whom he had voluntarily admitted to the premises. After the Utah Court of Appeals vacated the arrestee's conviction for possession and distribution of drugs, which he sold to an undercover informant he had voluntarily admitted into his house, he brought a ***42 U.S.C. § 1983*** damages action in federal court, alleging that the officers who supervised and conducted the

Circuit, this Court held that it was appropriate for the district court to rely on decisions of three (3) out of circuit federal courts of appeal, as well as two (2) out of state Supreme courts to conclude that the Plaintiff's advocated rights was not clearly established when the search and arrest incident occurred. Specifically, this Court held as follows:

> **"When the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts. This doctrine had been considered by three Federal Courts of Appeals and two State Supreme Courts starting in the early 1980's. See, *e.g., United States v. Diaz, 814 F.2d 454, 459 (CA7)*, cert. denied, *484 U.S. 857, 108 S. Ct. 166, 98 L. Ed. 2d 120 (1987)*; *United States v. Bramble, 103 F.3d 1475 (CA9 1996)*; *United States v. Pollard, 215 F.3d 643, 648-649 (CA6)*, cert. denied, *531 U.S. 999, 121 S. Ct. 498, 148 L. Ed. 2d 469 (2000)*; *State v. Henry, 133 N.J. 104, 627 A.2d 125 (1993)*; *State v. Johnston, 184 Wis. 2d 794, 518 N.W.2d 759 (1994)*. It had been accepted by every one of those courts. Moreover, the Seventh Circuit had**

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warrantless search of the premises that led to his arrest after the sale, had violated the ***Fourth Amendment***. The District Court granted summary judgment in favor of the officers. Noting that other courts [out of circuit] had adopted the "consent-once-removed" doctrine, the district court concluded that the officers were entitled to qualified immunity because they could reasonably have believed that the doctrine authorized their conduct. The Tenth Circuit Court of Appeals held that the officers were not entitled to qualified immunity.

> **approved the doctrine's application to cases involving consensual entries by private citizens acting as confidential informants. See *United States v. Paul, 808 F.2d 645, 648 (1986).* The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit, see *United States v. Yoon, 398 F.3d 802, 806-808,* cert. denied, *546 U.S. 977, 126 S. Ct. 548, 163 L. Ed. 2d 460 (2005),* and prior to the Tenth Circuit's decision in the present case, no court of appeals had issued a contrary decision. The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries...... Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions."**

Pearson v. Callahan, 129 S.Ct. 808 , 822-23, 172 L. Ed. 2d 565 (2009).

Thus, the Eleventh Circuit's practice of narrowly interpreting the "clearly established" right directly conflicts with and, flies in the face of this Court's foregoing holding that out of circuit cases should be considered and that officers are entitled to rely on existing lower court cases without facing personal liability for their actions, and not just on in-circuit decisions. By the same token, Petitioners may rely on similar cases to establish that a right was clearly established. Yet, the Eleventh Circuit has casually restricted the territorial scope of decisional case law that it will review when analyzing whether a right is "clearly established," to include only the Supreme

Court, 11th Circuit and Georgia Supreme Court decisions. See, ***Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002); McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir. 2007); Marsh v. Butler County, 268 F.3d 1014, 1032 (11th Cir. 2001) (en banc); Courson v. McMillian, 939 F.2d 1479, 1498 (11th Cir. 1991); Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990), Hamilton v. Cannon, 80 F.3d 1525, 1532 n.7 (11th Cir. 1996).*** Such very narrow interpretation is greatly injurious to Plaintiffs trying to enforce their fourth amendment rights against government officials because, it severely limits the pool of available cases from which the Eleventh Circuit could adduce whether a right is clearly established, to the Plaintiff's ultimate disadvantage. Therefore, this Court's review of the Eleventh Circuit's decision hereof is imperative and necessary to bring uniformity among the circuits.

B. The Law was Clearly Established on April 4, 2005 that, shooting a Compliant, Unarmed Mentally Disturbed Suspected Felon who was neither Fleeing nor Resisting Arrest and, did not Threaten the Police Officers in any manner, was an unreasonable search and seizure and violated Fourth Amendment law.

In ***Garner***, it was held that "a police officer may not seize an unarmed, nondangerous suspect by shooting him dead." ***Garner, 471 U.S. at 11***. The district court hereof relied on the ***Garner*** principle to conclude that "a jury could conclude that a reasonable officer on the scene possessing the same facts as the defendant officers in this case would not have had a reasonable belief that deadly force was warranted under the circumstances." ***(Appx. B at 47a-48a)***. The district court here, found that "Zachary was intoxicated and loud, but he did not directly threaten the officers, and the officers never saw a weapon in Zachary's hands or on his person during their twenty of so minutes on the scene before the shooting." ***(Appx. B at 48a)***. Although, the Eleventh Circuit's decision disagreed with the district court's foregoing factual finding, yet, it is clear that ***Harlow*** and ***Garner*** provided clearly established law in this case and, stood for the proposition that police officers were not permitted to shoot and kill an unarmed man who was not threatening the officers or others. Notwithstanding ***Harlow*** and ***Garner***, several out of circuit cases clearly established the above right in the context of beanbag deployment.[3] In reversing the court's grant of summary judgment to the officer in ***Deorle***, the Ninth Circuit held that:

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[3] In Deorle, on September 9, 1996, officers responded to a call which asserted that a mentally-disturbed suspect was creating a disturbance in his home. Like Zachary, Deorle had consumed alcohol along with prescribed medication, was suicidal, and his wife contacted 911.Rutherford, along with 13 other officers responded. Although, he was verbally abusive and initially refused to let the police into his home, Deorle was physically compliant and generally followed all of the officers' commands. Deorle was agitated, roamed on or about his property, and threatened to "kick Rutherford's ass." Armed with a 12 gauge shotgun loaded with "less-lethal" beanbag rounds, Rutherford positioned himself in a garden adjacent to Deorle's house. As Deorle walked towards him, Rutherford aimed the beanbag shotgun at Deorle's lower right rib area and fired from 30 feet away. Prior to shooting him, Rutherford did not order Deorle to halt or, warn Deorle that he was going to shoot him. The beanbag round struck Deorle on his face, knocked him off his feet, and lodged "half out of his eye." Deorle suffered multiple fractures to his cranium, loss of his left eye, and lead shot embedded in his skull.

> **"Every police officer should know that it is objectively unreasonable to shoot–even with lead shot wrapped in a cloth case–an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals. Here, all those factors were present. Deorle had complied with the police officers' instructions, had discarded his potential weapons whenever asked to do so, and had not assaulted anyone."**

Deorle v. Rutherford, 272 F.3d 1272, 1287 (9th Cir. 2001), cert. denied, 536 U.S. 958, 122 S.Ct. 2660, 153 L.Ed.2d 835 (2002). The 9th Circuit considered it significant that Rutherford and a host of other officers were at the scene for over half an hour before and had the opportunity to observe Deorle before Rutherford shot the emotionally disturbed Deorle implying he posed no threat to anyone; that Rutherford had a clear line of escape from the position he assumed; that he failed to warn Deorle that he was going to shoot him. ***Id. at 1283-1284***. All of the foregoing significant facts considered important by the Ninth Circuit Court in **Deorle** are present here; the district court made factual findings that:

> **"Zachary never made any threats directly to the officers, and he never threatened Stephens or anyone else in front of the officers. None of the eight officers on the scene saw a weapon in Zachary's hands or**

> **on his person. The officers knew that Zachary was a psychiatric case. Zachary repeatedly told the officers that he had no weapons, and he lifted his shirt to show them that there was no weapon in his waistband. Stephens told both 911 and the officers on the scene that she did not feel threatened, that Zachary did not have a gun, and that Zachary had calmed. Zachary came out onto the porch at least three times. Each time, Zachary went back into the house, but each time, he returned to the porch unarmed and telling officers that he was unarmed. Before he went into the house for the last time, Zachary told the officers he was going to bed. After that, Zachary complied with the officers' requests for him to come back outside, and Zachary was still unarmed."**

(Appx. A at 47a).

Invariably, just as Rutherford's behavior in **Deorle**, the police officers never warned Zachary that if he did not surrender, they were going to shoot him. **(Coats Depo. p. 177).** Importantly, Coats testified that the reason he was ordered to not let Zachary back into his house was because Zachary previously told them he was going to bed and, they weren't sure if he would come out again if they allowed him to get back in the house. Thus, it is clear that the reason that Zachary was shot was not because of any safety concerns about a child inside the house as claimed by the officers, but because they did not want him to go to bed and leave the officers outside. This is a question the jury should be allowed to resolve, and not the appeals court. Thus, contrary to The Eleventh Circuit's conclusion, the police officers' conduct here were so egregious that a constitutional right was clearly violated. See, **Deorle, *Id. at 1286.***

Other Courts have also applied the ***Garner*** and ***Deorle*** principles in beanbag, sage launcher and police dog attack contexts. If the Eleventh Circuit had properly considered out of circuit cases, it would have observed that the law was clearly established contrary to its findings. ***See Omdahl v. Lindholm, 170 F.3d 730, 733 (7th Cir. 1999); Otero v. Woods, 316 F.Supp.2d 612 (S.D. Ohio 2004); Kuha v. City of Minnetonka, 365 F.3d 590, 597-98 (8th Cir.2004); Vathekan v. Prince George's County, 154 F.3d 173, 175 (4th Cir. 1998); Kopf v. Wing, 942 F.2d 265, 268-69 (4th Cir. 1991)***.[4] Here, Zachary was neither fleeing nor resisting arrest, nor possessed any weapons, nor threatened the police officers in any manner. He was totally compliant and carried out all of the officers' commands including coming out of his house when ordered to do so at which time he was shot, and no verbal warning was given to Zachary before he was fatally shot. No doubt, it was clearly established under ***Deorle***, 11th Circuit's ***Lundgren*** and, other out of circuit decisions before April 4, 2005, that officers were required to warn potential victims before shooting them, and that shooting an unarmed, non-fleeing suspected felon dead to just arrest him violated Fourth Amendment law.

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[4] ***See Omdahl v. Lindholm, Id. at 733*** ("Thus, determining whether Lindholm's and Stoffel's actions were objectively unreasonable requires us to resolve the factual dispute regarding the classification of the beanbag rounds as deadly force. Making such a determination is improper because it requires us to step beyond the jurisdictional limitations of this Court by resolving a material issue of fact."); ***Otero v. Woods, Id.*** (A reasonable jury could find, based on the facts as presented by Plaintiff, that the use of wooden baton rounds here was objectively unreasonable and that Defendants Zoretic, Wood, and Curmode each played a significant role in this use of force and thus should be liable to Plaintiff under § 1983); ***Kuha v. City of Minnetonka, Id.*** at ***597-98*** (concluding "that a jury could properly find it objectively unreasonable to use a police dog trained in the bite and hold method without first giving the suspect a warning and opportunity for peaceful surrender"), ***Vathekan v. Prince George's County, Id. at 175*** (holding that it is objectively unreasonable for a police officer to fail to give a verbal warning before releasing a police dog to seize someone), ***Kopf v. Wing, Id. at 268-69*** (reversing summary judgment in favor of officer

III. THE ELEVENTH CIRCUIT'S DECISION IS INTERNALLY INCONSISTENT, FAILS TO FOLLOW ITS OWN PRECEDENT AND CONFLICTS WITH THE FIFTH, SIXTH, AND SEVENTH CIRCUITS' DECISIONS, WHICH HOLD THAT THE QUESTION OF WHETHER THE BEANBAG ROUND CONSTITUTES DEADLY FORCE IS A FACTUAL FINDING RESERVED TO THE DISTRICT COURT AND, THE CIRCUIT COURTS ARE WITHOUT JURISDICTION TO REVIEW TRIAL COURT FACTUAL FINDINGS.

A. The Eleventh Circuit Panel's Decision is Either Internally Inconsistent or Fails to

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defendants where there existed a factual dispute regarding whether a verbal warning was given).

Present Grounds for Reversal and, Conflicts with its Own Precedent.

The Eleventh Circuit's decision conflicts with its own prior decision in ***Lundgren, id.*** and, an in-circuit district court decision of ***Hernandez v. City of Miami, 302 F. Supp. 2d 1373 (S.D.Fla. Feb. 13, 2004), affirmed without opinion, 204 U.S. App. LEXIS 28318 (11th Cir. Oct. 19, 2004),*** which held that officers were not permitted to shoot dead an unarmed, non-threatening suspected felon. In ***Lundgren***, in affirming the denial of qualified immunity to the errant officers the Eleventh Circuit took note of the factual disputes in the case and declared: " We hold that shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others was--even in July, 1983-- an unreasonable seizure and clearly violate fourth amendment law." ***Id. at 603***. Thus, it was clearly established in Eleventh Circuit as far back as 1983 that shooting one who was not threatening an officer, fleeing, or engaging in any threatening behavior constituted unreasonable seizure and violated the 4th Amendment law. Yet, in the instant case, the same Eleventh Circuit employed tortured logic and, went to great lengths to approve the police officers' similar conduct in shooting the unarmed, non-threatening Zachary. Likewise, in ***Hernandez v. City of Miami, Id.,*** in finding that the officer was not entitled to qualified immunity, a district court found that the suspect had dropped his weapon and was running away unarmed, any perceived threat had dissipated, the officer failed to give any warning prior to firing his weapon, and therefore, the officer had no probable cause, or arguable probable cause to use deadly force. ***Id. at 1379***.

No doubt, ***Lundgren*** and ***Hernandez*** cases make it absolutely clear that the law was clearly established in the 11th Circuit, pre-April 4, 2005, that it was a 4th amendment violation, and excessive force to shoot someone that was in similar position as Zachary in this case. Respectfully, ***Lundgren*** and ***Hernandez*** are akin to the case instanter, and the 11th Circuit sidestepped its own precedent to conclude otherwise. In fact, the Eleventh Circuit inexplicably contradicted itself when in its attempt to distinguish ***Deorle*** from the case instanter, ended up pointing out the factual similarities between the two cases. First, the 11th Circuit decision held that "Despite factual similarities, the California case cannot provide fair warning to the officers in Columbus, Georgia....," but then the circuit court turned around in footnote 3 to state that "The ***[Deorle]*** case is also factually distinguishable," and went on to identify what it considered to be differences, which were in fact similarities, between the two cases, as follows; contrary to the Eleventh Circuit's statements, the victims in both cases were shot with beanbag guns; both men were psychologically troubled; both men had been acting erratically. **(Appx. A at 11a).**

Also, the 11th Circuit surprisingly concluded that the officers in the instant case faced substantially greater threat than the officers in ***Deorle***, because, Mr. Deorle had been holding a hatchet, a crossbow, and a can but discarded the weapons at the officers request, and yet, Zachary did not have any weapon of any kind, whatsoever, at any time throughout the course of the standoff with the police officers. Respectfully, these 11th Circuit appellate "factual" findings are exact opposite of the district court's factual findings in this case. **(Appx. B at 28a)**. Indeed, it is rather difficult to see how an unarmed man presented more threat to the officers than, another who was armed with multiple weapons but discarded them upon the officers' request. This Court must intervene to correct the injustice of the Eleventh Circuit's remarkably charitable disposition towards these "law enforcement officers who used deadly force against an unarmed man under dubious circumstances," as concluded by the district court in this case. **(Appx. C at 68a-69a)**.

B. The Eleventh Circuit Decision Exceeded Its Jurisdiction and Improperly Usurped the District Court's Factual Finding Role, and Conflicts with the Fifth, Sixth, and Seventh Circuits.

The Eleventh Circuit's opinion, if read literally, means nothing more than that the district court made incorrect factual findings that Zachary was a mentally disturbed man, did not present any threat of harm to the officers, was compliant, did not possess any weapons, pulled up his shirt to show the officers that he did not possess any weapons, did not refuse to obey any instructions of the officers, held up his arms in submission to the officers and, that any previous threats to shoot at the officers to the 911 operator had dissipated by the time the officers arrived at Zachary's home and, that Zachary had calmed. Consequently, the Eleventh Circuit improperly made the factual findings that beanbag munition was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun;" and that "[T]he case law from the relevant jurisdictions teaches us nothing about safe distances for shooting a beanbag gun," and thereby, granted qualified immunity to the officers. In so holding, the 11th Circuit improperly exceeded its interlocutory jurisdiction which was limited, with regard to qualified immunity, to consideration of only questions of law, and not to make its own factual findings. The Eleventh Circuit's foregoing decision directly conflicts with the Fifth, Sixth, and Seventh Circuits.

In the Fifth Circuit, it is the law that whether a particular use of force is "deadly force" is a question of fact, not one of law. See, ***Meadours v. Ermel, 483 F.3d 417 (5th Cir. 2007).*** In denying jurisdiction to review the officers' appeal of denial of qualified immunity by the district court in ***Meadours***, the Fifth Circuit held:

> **"In sum, the district court found that issues of fact exist. The district court found that both sides presented evidence to support their version of events and thus, the issues of fact were genuine. While we lack jurisdiction to review that finding, we may review the district court's determination that the factual issues are material. The question of when and where Meadours was shot is integral to determining whether the officers' actions were reasonable, and consequently, we conclude that the dispute is material. Because genuine issues of material fact exist, summary judgment is not appropriate and we remand for a trial on the merits."**

Id. at 424. Similarly, in ***Gutierrez v. City of San Antonio, 139 F.3d 441, 446 (5th Cir. 1998)***, the

Plaintiff brought suit against the police officers, for allegedly depriving the Plaintiff of his rights under the Fourth and Fourteenth Amendments by hog-tying him. The officers sought interlocutory appeal seeking dismissal or summary judgment based on qualified immunity. The Fifth Circuit denied jurisdiction and held "[B]ecause we conclude that material disputes of fact prevent us from determining the objective reasonableness of the officers' conduct, we dismiss their appeal of the Fourth Amendment claim for lack of jurisdiction." ***Id.*** See also, ***Flores v. City of Palacios, 381 F.3d 391, 394 (5th Cir. 2004)*** (A district court's finding of fact cannot be reviewed at the qualified immunity stage); ***Hale v. Townley, 45 F.3d 914, 918 (5th Cir.1995)***; ***Naylor v. State of La., Dep't of Corrections, 123 F.3d 855, 857 (5th Cir.1997).***

Likewise, in the Sixth Circuit Court of Appeals, the Court opined as follows:

> **"It is the province of the jury, not the court, to decide on the credibility of the defendant's account of the need for force....... In this case, however, the jury becomes the final arbiter of defendant's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury."**

Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994). Thus, the court denied jurisdiction and left the factual findings in tact for the jury's determination at trial. Here, the officers argued, and the Eleventh Circuit agreed that they shot Zachary because they did not want him to go back into his home and harm his daughter. Yet, officer Coats deposed to a different contradictory reason, while Stephens repeatedly advised the officers that she did not feel threatened, that the "baby" was fine and that Zachary had calmed. The Eleventh Circuit should have denied jurisdiction and allowed the jury to decide whose version of the facts to believe.

Also, the 7th Circuit held that whether shooting an individual with beanbags constitutes deadly force is a question of fact that an appeals court may not review. Thus, in ***Omdahl v. Lindholm, Id. at 733-734,*** the Seventh Circuit held that:

> **"The existence of a factual dispute prevents us from resolving this issue. Lindholm and Stoffel ask this Court to reverse the district court's denial of their motion for summary judgment with regard to their defense of qualified immunity. Reaching such a conclusion would require us to decide a material issue of fact--whether bean bag rounds constitute deadly force. We do not have the jurisdictional authority to make such a decision. It is for the trial court to resolve issues of fact, not an appellate court. Simply stated, we do not have jurisdiction to consider the merits of this interlocutory appeal."'**

Based on the foregoing, it is clear that the 11th Eleventh Circuit's appellate findings are in error and, its decision that deployment of the beanbag rounds was not deadly force, but instead "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun," conflicts with the Fifth, Sixth and Seventh Circuits which hold that such question is a matter for the jury. A writ of Certiorari should be granted to address these conflicts between the circuits on this very important issue.

IV. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT IN *PAYTON* AND, THE SIXTH, NINTH, TENTH CIRCUITS AND A DISTRICT COURT AS REGARDS WHETHER THE FOURTH AMENDMENT LAW AGAINST WARRANTLESS ARRESTS/SEIZURES IS VIOLATED WHEN, OFFICERS COERCE A SUSPECT TO COME OUTSIDE HIS HOME UNDER THREAT OF IMMEDIATE FORCE, ONLY TO SHOOT AND ARREST THE SUSPECT WITHOUT ANY WARNING AND WITHOUT A WARRANT WHEN THE SUSPECT STEPS OUTSIDE ONTO HIS FRONT PORCH IN OBEDIENCE TO THE OFFICER'S COMMAND, IN THE ABSENCE OF EXIGENT CIRCUMSTANCES.

It is well settled by this Court that unless exigent circumstances are present, the threshold to the entrance of the home "may not reasonably be crossed without a warrant." ***Payton v. New York, 445 U.S. 573, 590, 100 S. Ct. 1371, 63 L. Ed. 2d 369 (1980).*** Two "specifically established and well-delineated exceptions" are warrantless searches made pursuant to consent or under exigent circumstances. ***Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967).*** Notwithstanding, and contrary to the Eleventh Circuit's decision hereof which ratified the officers' warrantless shooting and arrest of Zachary after being coerced to come outside his home, the Sixth, Ninth and Tenth Circuits subscribe to a conflicting holding that ***"Payton*** is also violated where there is such a show of force that a defendant comes out of a home under coercion and submits to being taken in custody." See, ***United States v. Maez, 872 F.2d 1444, 1451 (10th Cir. 1989), citing, United States v. Al-Azzawy, 784 F.2d 890, 893 and n.1 (9th Cir. 1985), cert. denied, 476 U.S. 1144, 106 S. Ct.2255, 90 L. Ed. 2d 700 (1986); United States v. Morgan, 743 F.2d 1158, 1164 (6th Cir. 1984), cert. denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490; United States v. Edmondson,791 F.2d 1512, 1514-15 (11th Cir. 1986)***. "[T]he important point is that in cases of physical intrusion, or coercion to leave the home....the privacy of the home is effectively invaded." ***Maez, Id.***

In both ***Al-Azzawy*** **and** ***Morgan***, the Sixth and Ninth Circuits reasoned that where the police surrounded the defendants' homes and requested their exit by bullhorn, then in such circumstances, ***Payton*** was violated. ***Al-Azzawy, Id. at 893***; ***United States v. Morgan, Id. at 1166.*** In ***Morgan***, the Court declared:

> **"[A]lthough, there was no direct police entry into Morgan's home prior to Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan......Thus, the warrantless arrest of Morgan, as he stood within the door of a private home, after emerging in response to coercive police conduct, violated Morgan's fourth amendment**

> **rights. Id. at 1166. A contrary rule would undermine the constitutional precepts emphasized in *Payton*."**

Morgan, Id. at 1166-67, citing, United States v. McCool, 526 F. Supp. 1206, 1209 (M.D. Tenn. 1981). Here, Zachary's home was surrounded by about 8 armed officers, with their blue lights flashing, search lights beamed on the house, and 911 instructed Zachary to go outside and assure the police that he was not armed. The only reason Zachary agreed to go outside was because he felt coerced to do so by 911 and show of force by CPD officers, because he believed he would be arrested if he went outside. After Stephens returned to the porch from speaking with Hudson, Zachary told Hudson and other officers that "this is over with," and that he was "going to bed," and closed the door behind him. Hudson then yelled Zachary's name and ordered him to come outside, and when he stepped out to his front porch, he was shot by Coats without any warning or warrant.

The grant of this petition for certiorari is necessary to resolve the conflict between the Eleventh and other circuits as to whether ***Payton*** is violated when officers command a suspect to come outside his home under threat of force and, then to shoot and arrest the suspect without a warrant where no exigent circumstances exist.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be Granted.

Respectfully submitted,

BOBBY C. ANIEKWU
Georgia State Bar No. 019840
Counsel of Record
BOBBY C. ANIEKWU & ASSOCIATES
127 Peachtree Street, N.E.
Suite 410 - The Candler Building
Atlanta, GA 30303
Bobby.Aniekwu@att.net
(404) 885-1717

Attorney for Petitioners

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-11078

D. C. Docket No. 07-00052-CV-CDL-4

[Filed April 20, 2010]

WILLIE L. GLENN, as Personal)
Representative of the Estate)
of Lester Zachary,)
KAREN ZACHARY, Individually, and)
As Next Friend of Lester Zachary,)
)
Plaintiffs-Appellees,)
)
versus)
)
CITY OF COLUMBUS, GEORGIA,)
RICHARD BOREN, Individually,)
and In his Official Capacity)
as Chief of Police, et al.,)
)
Defendants-Appellants.)
)

Appeal from the United States District Court
for the Middle District of Georgia

(April 20, 2010)

Before BLACK, MARCUS and HIGGINBOTHAM,[*] Circuit Judges.

PER CURIAM:

In this tragic excessive force case, Columbus, Georgia, police officers Gary Bolen, Kenneth Hudson, Joseph Coats, and Gregory Touchberry appeal the district court's denial of their motion for summary judgment on the basis of qualified immunity. The representatives of Lester Zachary's estate claim that Officer Coats and Sergeants Touchberry and Hudson violated Zachary's rights under the Fourth Amendment when they fatally shot him with a beanbag gun in the early morning hours of April 4, 2005. The estate also says that Officer Bolen violated Zachary's constitutional rights when he prepared a training manual that incorrectly advised officers to aim the beanbag gun at the target's center mass at distances of twenty to forty feet.

After thorough review, we conclude that the officers are entitled to qualified immunity. The officers' use of a beanbag gun under the tense and dangerous circumstances of this case was not clearly established to be illegal. Accordingly, we reverse the denial of qualified immunity and remand for further proceedings consistent with this opinion.

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[*] Honorable Patrick E. Higginbotham, United States Circuit Judge for the Fifth Circuit, sitting by designation.

I.

A.

We review de novo a district court's disposition of a summary judgment motion based on qualified immunity. Lee v. Ferraro, 284 F.3d 1188, 1190 (11th Cir. 2002). Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." McCullough v. Antolini, 559 F.3d 1201, 1204-05 (11th Cir. 2009) (citation omitted). Moreover, we are "required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the [summary judgment] motion." Scott v. Harris, 550 U.S. 372, 378 (2007) (citation and quotation marks omitted) (alteration in the original). Because the plaintiff is deceased, and because Helen Stephens, the only other non-officer witness to the entire event, could not recall the incident when she was deposed, we necessarily derive many of the facts from the officers' accounts of the shooting and from the 911 transcript. Nevertheless, "where there is a discrepancy between the statements of the defendants, we have resolved the dispute by using only those statements most favorable to the plaintiff." McCullough, 559 F.3d at 1202.

B.

This sad story began around 3:00 in the morning on April 4, 2005, when Lester Zachary, a veteran plagued with mental illness and recurring dreams of deaths he had witnessed in wartime, awoke with bad dreams. He called the Veteran's Administration ["VA"] Hospital tele-nurse line to ask for help managing the nightmare and his anxiety. In that call, Zachary told the nurse that he had been dreaming of killing children, and that he was armed.

A nurse from the VA Hospital reported Zachary's call to the Columbus, GA 911 line. She described her call with Zachary this way: "He called, he was extremely upset, that nightmares woke him up, nightmares of killing kids. He was raving. He has slurred speech. He was talking about the kids he killed. . . . And, he does have guns, and presume that they're loaded." The VA nurse also warned the dispatcher that Zachary was suicidal, threatening to kill himself with a gun.

The 911 dispatchers relayed this information to police officers at approximately 3:13 A.M., alerting them that there was a "psychiatric problem" who had "told calltaker that he was having dreams of 7100 [homicide], and advis[ed] he does have a gun in the residence." A firetruck and Emergency Medical Services drove to Zachary's one-level house, followed by Columbus Police Department ("CPD") officers, including Sergeants Hudson and Touchberry and Officer Coats. The officers encountered a large dog tied to the fenced-in front porch.

Between the first police dispatch and Zachary's shooting at 3:41 A.M., the police dispatchers called Zachary's house many times. At first, Zachary threatened the officers, shouting "[y]ou tell these guys in front my door, I'm . . . going to start shooting. I'll start shooting." Later, Zachary answered in a calmer tone: "Nothing wrong, baby. Nothing wrong, I'm fine." Nevertheless, after the 911 dispatchers investigated Zachary in their system, they reported to the officers that he was classified as dangerous.

The officers and dispatchers tried to coax Zachary and his common-law wife, Helen Stephens, out of the house to talk with them. Zachary left the house at least twice, remaining on the porch, shouting, waving his arms wildly, and pacing. He told the officers to leave the property. He lifted his shirt to show the officers that he was unarmed, but he warned the officers that his dog would bite them if they approached.

Stephens left the porch to talk with Sergeant Hudson. She told him that Zachary was unarmed and that she felt safe. She also told the officer that there was a fourteen-year-old child sleeping in the back bedroom. Zachary announced to the officers that "this is over with" and that he was going to bed. He took Stephens by her upper arm and "ushered" her back into the house, shutting the door.

Worried that Zachary would retreat into the house before he could be secured, the officers decided to deploy the beanbag munition to subdue him. Officer Coats positioned himself behind a car about twenty-one feet from the porch with the beanbag gun. Hudson and Touchberry summoned Zachary out of the house. When he emerged, Coats shot Zachary with the beanbag gun. The round hit Zachary in the lower back. He fell onto a couch on the porch. After Zachary tried to push himself up, Coats shot again. The shot ricocheted off of a flower pot on the porch, hitting

Zachary in the upper left chest. Zachary fell to the ground. Hudson and Touchberry vaulted themselves over the porch fence and handcuffed Zachary. The officers charged Zachary with making terroristic threats and acts in violation of O.C.G.A. § 16-11-37(a).[1] Although he was able to walk off the porch after the shooting, Zachary sustained serious internal bleeding. He died two days later in the hospital.

C.

Willie L. Glenn, the administrator of Zachary's estate, and Karen Zachary, Lester Zachary's wife, brought this suit in the United States District Court for the Middle District of Georgia, seeking to hold the defendants Hudson, Touchberry, Coats, Bolen, Chief of Police Richard Boren and the City of Columbus liable under 42 U.S.C. § 1983 for violations of Zachary's Fourth Amendment right to be free from an unreasonable seizure and from excessive force. The plaintiffs also asserted violations of the Fourteenth Amendment's Due Process Clause, the First Amendment and Fourteenth Amendment's Equal Protection Clause. Finally, they claimed a civil conspiracy under 42 U.S.C. § 1985 and various torts arising under Georgia law.

After discovery, the defendants moved for summary judgment. On December 2, 2008, the district court issued an order, granting the motion for summary judgment for most of the claims, but denying qualified immunity to the officers for the Section 1983 excessive force claims.[2] Glenn v. City of Columbus, Ga., No. 4:07-cv-52 (CDL), 2008 WL 5115032, at *12 (M.D. Ga. Dec. 2, 2008).

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[1] Under Georgia law, "[a] person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence." O.C.G.A. § 16-11-37(a).

In denying the officers qualified immunity, the district court concluded that their use of force was not objectively reasonable under the Fourth Amendment. The court reasoned that the two threats of homicide were mitigated when Zachary appeared to have calmed some and lifted his shirt to show the officers that he was unarmed. Id. The district court also found that there was a jury question about whether Bolen violated Section 1983 in delivering instructions to his officers concerning the use of the beanbag gun. Id. at *14. The officers timely appealed the denial of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 528-30 (1985).

II.

The only issue before us in this interlocutory appeal is whether Officers Coats and Bolen and Sergeants Touchberry and Hudson are entitled to qualified immunity. "[Q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." Oliver v. Fiorino, 586 F.3d 898, 904 (11th Cir. 2009) (quoting McCullough v. Antolini, 559 F.3d 1201, 1205 (11th Cir. 2009)). Qualified immunity is intended to protect officials carrying out their discretionary duties from "personal monetary liability and harassing litigation . . . as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1987). This protection is broad. "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley v. Briggs, 475 U.S. 335, 341 (1986).

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[2] The district court also denied summary judgment for the following claims: 1) Section 1983 claims against the City of Columbus for excessive force; 2) assault and battery claims against Coats, Hudson, and Touchberry; and 3) intentional infliction of emotional distress claims against Coats, Hudson, and Touchberry. Glenn v. City of Columbus, Ga., No. 4:07-cv-52 (CDL), 2008 WL 5115032, at *20 (M.D. Ga. Dec. 2, 2008).

Qualified immunity protects officers acting within the scope of their discretionary authority at the time of the incident. McCullough, 559 F.3d at 1205. If the officer was acting within his discretionary authority -- and it is undisputed that Bolen, Hudson, Touchberry, and Coats were -- then the plaintiff has the burden to prove that a reasonable officer would have known that he was violating the Constitution or the laws of the United States. Id. To defeat the presumption of qualified immunity, the plaintiff must demonstrate both that the facts, when viewed in a light most favorable to the plaintiff, establish a constitutional violation and that the illegality of the officer's actions was "clearly established" at the time of the incident. Pearson v. Callahan, 129 S.Ct. 808, 815-16, 818 (2009). In Pearson, the Supreme Court recently held that we are no longer obliged to conduct the qualified immunity analysis in the sequence set forth in Saucier v. Katz, 533 U.S. 194 (2001). Accordingly, we may now exercise our discretion to decide which prong of the inquiry to address first. Pearson, 129 S.Ct. at 818.

In this case, we need not address the first question at all because, even if we were to assume that Zachary's shooting violated the Constitution, the plaintiffs cannot demonstrate that the law was so clearly established as to give the officers fair warning that shooting a beanbag gun at Zachary under these circumstances would have been illegal. We, therefore, begin and end our analysis with an examination of the second prong.

To prove that the officers violated "clearly established statutory or constitutional rights of which a reasonable person would have known," Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the plaintiff may either offer case law from the relevant jurisdictions or show that the right is one of "'obvious clarity'-- i.e., where the officer's conduct 'lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [the official], notwithstanding the lack of fact-specific case law' on point." Oliver, 586 F.3d at 907 (quoting Vinyard v. Wilson, 311 F.3d 1340, 1355 (11th Cir. 2002)) (alteration in the original).

As for the case law, "we look to the precedent of the Supreme Court of the United States, this Court's precedent, and the pertinent state's supreme court precedent, interpreting and applying the law in similar circumstances." Id.; McClish v. Nugent, 483 F.3d 1231, 1237 (11th Cir. 2007); Marsh v. Butler County, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc). Prior cases need not demonstrate the illegality of challenged conduct in the exact factual circumstance. Hope v.

Pelzer, 536 U.S. 730, 739 (2002). Rather, the issue is "whether the state of the law [on April 4, 2005] gave respondents fair warning that their alleged treatment of [Zachary] was unconstitutional." Id. at 741; Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1278 (11th Cir. 2004). "'This inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" McCullough, 559 F.3d at 1205 (quoting Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)).

"[A] claim of 'excessive force in the course of making [a] . . . 'seizure' of [the] person . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard.'" Scott v. Harris, 550 U.S. 372, 381 (2007) (quoting Graham v. Connor, 490 U.S. 386, 388 (1989)) (alterations in the original); Lee, 284 F.3d at 1197. When determining whether the force used to effect a seizure is reasonable for Fourth Amendment purposes, a court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests." Graham, 490 U.S. at 396. We necessarily consider several factors in the calculus, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. This standard allows for an understanding that reasonable officers may incorrectly perceive the seriousness of a threat: "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." Id. at 396-97.

To begin with, there is no case in either the United States Supreme Court, the Supreme Court of Georgia, or in the United States Court of Appeals for the Eleventh Circuit that comes close to identifying the illegality of the officers' use of force in these factual circumstances. First, there is no case involving beanbag munitions in any of the relevant courts. The plaintiff principally relies upon the Ninth Circuit's beanbag case, Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001), to establish that the officers violated clearly established law. Despite factual similarities, the California case cannot provide fair warning to the officers in Columbus, Georgia, because, again, in this Circuit, only cases from the pertinent state supreme court, the United States Supreme Court, or the Eleventh Circuit can clearly establish the law.[3]

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[3] The case is also factually distinguishable. In Deorle, Officer Rutherford fired a beanbag gun at a psychologically troubled man who had been threatening to commit suicide and had been acting erratically. Deorle v. Rutherford, 272 F.3d 1272, 1275-78 (9th Cir. 2001). Although Deorle had been holding a hatchet, a crossbow, and a can, he had discarded the weapons at the officers' request. Id. at 1276-77. Rutherford shot nevertheless, hitting Deorle in the face, fracturing his skull, and dislodging his left eye. Id. at 1278. Because the threats the officers faced in this case differed substantially from those found in Deorle, the facts give yet another reason why Deorle could not "fairly warn" the officers of a potential constitutional violation in these circumstances. In Deorle, the officers had full view of Deorle throughout the incident and could assess the threat he posed to himself. In sharp contrast, here, the officers feared allowing Zachary to retreat back into the

Nor is there any roughly analogous case law that would suffice to put the officers on notice of the illegality of their conduct in these "tense, uncertain" circumstances. On April 4, 2005, there were no cases in the relevant jurisdictions on the use of less than deadly force (here a beanbag munition) to subdue a suspect who had threatened to shoot at officers who were in front of his house, spoke about killing children, and threatened suicide.[4] There were reported cases involving handguns, see, e.g., Carr v. Tatangelo, 338 F.3d 1259 (11th Cir. 2003), and a case involving the use of a Taser gun, see Draper v. Reynolds, 369 F.3d 1270 (11th Cir. 2004), but this weapon (a beanbag gun) lies in the unwashed middle somewhere between deadly force and the use of a Taser gun.

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house, where he might have weapons hidden and a child was asleep.

[4] The closest factual case involving the use of less than lethal munitions is Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005), where a panel of this Court held that the officers used excessive force in shooting a baton gun at the head of man threatening to commit suicide. However, the Mercado opinion was issued on April 29, 2005, a few weeks after the incident. It cannot be considered for the purposes of whether the officers' actions were clearly established to be illegal at the time of the shooting. In any case, Mercado is factually distinguishable because the victim in that case "was not committing a crime, resisting arrest, or posing an immediate threat to the officers at the time he was shot in the head." Id. at 1157-58. Here, the officers had probable cause to arrest Zachary for making terroristic threats in violation of O.C.G.A. § 16-11-37(a). The officers also perceived a real threat to the child in the house and to Stephens as well. Finally, it is not at all clear that the use of a baton gun was equivalent to the use of a beanbag munition.

For the clearly established prong, the district court's opinion cites only to Tennessee v. Garner, 471 U.S. 1, 11-12 (1985), for the proposition that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Id. at 11. However, Garner itself held that where the officer "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Id. When there is "threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." Id. at 11-12.

The district court's reliance on Garner is misplaced. First, Garner is distinguishable, because, instead of merely preventing the "escape" of a non-threatening felon, the officers in this case used force to prevent threatened harm against a child, whom the officers identified as the fourteen-year-old sleeping in the house, against Stephens, or against Zachary himself. Moreover, under Garner's terms, deadly force may be used when "the suspect poses a threat of serious physical harm, either to the officer or to others." Id. at 11. Here, the officers reasonably believed on the basis of the defendant's threats that he was equipped to commit and had contemplated homicide as well as suicide. Beyond that, and perhaps most importantly, the use of a bean bag munition, unlike a firearm, is not characterized as deadly force. The bean bag was classified by the Columbus Police Department as a

Level 6, the highest level use of force below deadly force, and was authorized "when deadly force is not justified, but empty hand control and OC [pepper spray] is not sufficient in effecting an arrest."

The plaintiff also argues that Lundgren v. McDaniel, 814 F.2d 600 (11th Cir. 1987), and Pablo Hernandez v. City of Miami, 302 F.Supp.2d 1373 (S.D. Fla. 2004), clearly establish the law. Again, we are unpersuaded. In Lundgren, where officers shot store owners with a handgun, a panel of this Court held that "shooting a suspected felon who was apparently neither fleeing nor threatening the officers or others . . . clearly violated fourth amendment law." 814 F.2d at 603. In Pablo Hernandez, a district court denied qualified immunity where the officers shot after the suspect had dropped the gun and was fleeing on foot. 302 F. Supp. 2d at 1380-81. But Pablo Hernandez, a district court case, cannot clearly establish the law in this Circuit. Moreover, neither case involved unresolved threats to use deadly force and neither involved the use of a beanbag gun. In short, neither of those gun cases are similar enough to make the "contours of the right . . . sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In the absence of clearly established case law on point, we are obliged to ask whether the officers' conduct was "so obviously at the very core of what the Fourth Amendment prohibits" that any officer would know it was illegal. See Lee, 284 F.3d at 1199 (concluding "the peculiar facts of this case are 'so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was violating the Constitution even without caselaw on point'")(quoting Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997)); Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 927 (11th Cir. 2000) (concluding that the law was clearly established despite the absence of on-point caselaw when an officer released police dog to attack plaintiff who was subdued on the ground and was not resisting arrest). "This standard is met when every reasonable officer would conclude that the excessive force used was plainly unlawful." Lewis v. City of W. Palm Beach, Fla., 561 F.3d 1288, 1292 (11th Cir. 2009). The instant case does not meet the standard for obvious clarity.

Although, as the district court has noted, the officers received some information that may have mitigated Zachary's threats to shoot himself or the police, the officers also received substantial corroboration that the situation was fraught with grave danger that Zachary would use deadly force. Again, when the officers first received the dispatch call at 3:13 A.M., they were told that Zachary was armed, was dreaming of killing children, and had threatened both suicide and homicide. At 3:17 A.M., Zachary repeated the threats of violence, this time specifically shouting to the 911 dispatcher, "[y]ou tell these guys in front [of] my door, I'm . . . going to start shooting. I'll start shooting." At 3:25 A.M., the 911 dispatch added that the 911 database had identified Zachary as dangerous. The officers also recounted that Zachary was ranting, raving, and yelling at them, that he ordered them to leave, that he was believed to possess a loaded firearm, and that he threatened the police that his large dog tied to the front porch would bite them.

At 3:34 A.M., when Stephens told Sergeant Hudson that there was a fourteen-year-old child asleep in the house, the new information increased the palpable fear that there was still another potential victim in the house. Similarly, when Zachary "ushered" Stephens by her upper arm into the house at 3:37 A.M., he gave the officers further reason to fear that deadly force would be used.

Moreover, Zachary's actions on the porch were -- even taking the facts in the light most favorable to the plaintiff -- belligerent and unpredictable. Although Zachary did show his empty waistband, he shouted for the police officers to leave and never came off of the porch. This is not a case where the victim was remotely restrained or compliant. See Lewis, 561 F.3d at 1292. Indeed, this case stands in contrast to those where we have denied qualified immunity to officers who used force once a subject was secured. See, e.g., Vinyard, 311 F.3d at 1348 (denying qualified immunity where an officer used force and pepper spray on a suspect who was "under arrest and secured with handcuffs and in the back seat of the patrol car"); Lee, 284 F.3d at 1200 (denying qualified immunity to an officer who beat the victim's head against the police car after she was handcuffed); Priester, 208 F.3d at 923-24, 928 (denying qualified immunity to an officer who ordered a dog attack on a defendant who was subdued on the ground).

Ultimately, this is one of those tragic, mistaken cases in the "hazy border between permissible and forbidden force." Smith v. Mattox, 127 F.3d 1416, 1419 (11th Cir. 1997). Quite simply, there was no clearly established law at the time that would have put Officer Coats and Sergeants Hudson and Touchberry on notice that the use of a beanbag munition in these circumstances violated the Fourth Amendment.

The district court's denial of Officer Bolen's claim for qualified immunity likewise fails on the clearly established prong.[5] The case law from the relevant jurisdictions teaches us nothing about safe distances for shooting a beanbag gun. We are also hard pressed to describe this case as one of "obvious clarity."

This is a close case, and where the officers' actions were not clearly established to be unconstitutional, and reasonable officers could disagree, the officers are afforded qualified immunity. Accordingly, we REVERSE and REMAND for proceedings consistent with this opinion.

REVERSED and **REMANDED.**

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[5] Officers facing supervisory liability claims are also entitled to qualified immunity unless the plaintiff proves a violation of a clearly established Constitutional right. See, e.g., Harper v. Lawrence County, Ala., 592 F.3d 1227, 1235-36 (11th Cir. 2010).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CASE NO. 4:07-CV-52 (CDL)

[Filed December 2, 2008]

WILLIE L. GLENN (as Personal)
Representative of the Estate of)
Lester Zachary), and KAREN)
ZACHARY (Individually, and As)
Next Friend of Lester Zachary),)
)
Plaintiffs,)
)
vs.)
)
CITY OF COLUMBUS, GEORGIA/)
CONSOLIDATED GOVERNMENT OF)
COLUMBUS, GEORGIA, RICHARD BOREN)
(Individually, and in his)
Official Capacity as Chief of)
Police), GARY A. BOLEN)
(Individually, and in his)
Official Capacity), KENNETH)
HUDSON (Individually, and in his)
Official Capacity), JOSEPH COATS)
(Individually), GREGORY)
TOUCHBERRY (Individually), and)

JOHN DOE (1-3),)
)
Defendants.)
)

ORDER

This action arises from the death of Lester Zachary ("Zachary"). Zachary died after a stand-off with Columbus police officers during which Zachary was shot twice with a beanbag munition. Plaintiffs seek to hold Defendants liable under 42 U.S.C. § 1983 ("§ 1983") for violating Zachary's Fourth Amendment rights to be free from unreasonable seizures and from the use of excessive force. Plaintiffs also contend that Defendants' actions give rise to a Fourteenth Amendment substantive due process claim, a civil conspiracy claim under 42 U.S.C. § 1985(3), a First Amendment claim, an equal protection claim, and various claims under Georgia law.

Presently pending before the Court is Defendants' Motion for Summary Judgment (Doc. 39).[1] For the reasons set forth below, Defendants' motion is granted in part and denied in part.[2] As discussed below, the Court finds that genuine issues of material fact exist as to the following claims:

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[1] Plaintiffs made motions to exclude Defendants' reply brief, reply regarding the statement of material facts and affidavits submitted with their reply brief (Docs. 58 & 59). As discussed at the November 5, 2008 hearing on the summary judgment motions, the Court finds that Plaintiffs' motions to exclude are without merit, and the Court denies those motions. The Court will therefore consider Defendants' reply affidavits to the extent they are relevant, and the Court will consider Defendants' reply briefing to the extent it is helpful.

1. Plaintiffs' § 1983 claims against Columbus for excessive force.
2. Plaintiffs' § 1983 individual capacity claims against Bolen, Coats, Hudson and Touchberry for excessive force.
3. Plaintiffs' assault and battery claims against Coats, Hudson and Touchberry.
4. Plaintiffs' intentional infliction of emotional distress claims against Coats, Hudson and Touchberry.

The Court grants Defendants' motion for summary judgment as to the remaining claims.

SUMMARY JUDGMENT STANDARD

Summary judgment may be granted only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A central purpose of the summary judgment rule is "to isolate and dispose of factually unsupported claims or defenses[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

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[2] Plaintiffs make a "Counter-Motion" for Summary Judgment (Docs. 48 & 51). As discussed below, the Court finds that genuine issues of material fact exist on each of Plaintiffs' surviving claims, so summary judgment is not appropriate, and Plaintiffs' motion is denied.

The party moving for summary judgment has the burden to show that there is no genuine issue of material fact. *See id.* at 323. To meet this burden, the movant may point the court to "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993) (internal quotation marks and citations omitted). In the alternative, the movant may show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.*, 477 U.S. at 325. This is because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

Once the summary judgment movant meets its burden, the burden shifts and the nonmoving party must produce evidence to show that there *is* a genuine issue of material fact. *See Celotex Corp.*, 477 U.S. at 324. The nonmoving party "must go beyond the pleadings," *id.*, and point the Court to "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2); *accord Celotex Corp.*, 477 U.S. at 324. The nonmoving party is not required to produce evidence in a form that would be admissible at trial, but it must point to some evidence to show a genuine issue of material fact. *Id.* Such evidence may be in the form of affidavits, depositions, answers to interrogatories or admissions on file. *Celotex Corp.*, 477 U.S. at 324; *accord* Fed. R. Civ. P. 56(c).

The movant is entitled to summary judgment if, after construing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in favor of the nonmoving party, no genuine issues of material fact remain to be tried. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). It is not enough to have *some* alleged factual dispute; there must be a genuine issue of material fact to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 247-48. A fact is *material* if it is relevant or necessary to the outcome of the suit. *Anderson*, 477 U.S. at 248. A factual dispute is *genuine* if the evidence would allow a reasonable jury to return a verdict for the nonmoving party—there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *accord Anderson*, 477 U.S. at 248.

FACTUAL BACKGROUND

Viewed in the light most favorable to Plaintiff, the record reveals the following:

I. The Parties

Lester Zachary ("Zachary"), a black male, died after a stand-off with Columbus Consolidated Government ("Columbus" or "the City") police officers during which he was shot twice with a beanbag munition. Plaintiff Glenn is the personal representative of Zachary's estate, and Plaintiff Zachary is Zachary's widow.

Defendant Boren, a white male, is, and was during the relevant timeframe, the police chief of Columbus. During the relevant timeframe, Defendant Bolen was the Columbus Police Department's ("CPD") assistant coordinator for in-service training. Defendant Hudson, a white male, is, and was during the relevant timeframe, a CPD sergeant. Defendant Coats is, and was during the relevant timeframe, a CPD officer. Defendant Touchberry is, and was during the relevant timeframe, a CPD sergeant.

Plaintiffs bring official and individual capacity claims against Boren, Bolen and Hudson. The official capacity claims are considered claims against Columbus. *See Smith v. Allen*, 502 F.3d 1255, 1272-73 (11th Cir. 2007) (official capacity suit is another way of pleading an action against the entity of which an officer is an agent). Plaintiffs' claims against Coats and Touchberry are individual capacity claims.

II. Zachary Calls the VA and the VA Calls Columbus 911

A little after 3:00 a.m. on April 4, 2005, CPD 911 call taker Ashley Joiner received a call from a nurse at a Veterans Affairs ("VA") Medical Center in Ohio. The VA nurse told Joiner that a Columbus man, Zachary, had called in a plea for help:

> He called, he was extremely upset, that nightmares woke him up, nightmares of killing kids. He was raving. He has slurred speech. He was talking about the kids he killed. He was manic, unable to focus. Just totally whacked out. And he refuses to go to the V.A. Emergency Room because he hates hospitals. Anyway,

> somebody's got to go out there. And, he does have guns, and presume that they're loaded.[3]

(Ex. F. to McDaniel Dep. at 1, Jan. 8, 2008, 911 Tr., Apr. 4, 2005 [hereinafter 911 Tr.].)[4] The nurse told Joiner that Zachary was "totally crazy" and that he had "a bunch of loaded guns in the house." (*Id.*) The nurse gave Joiner Zachary's telephone number and address, 2420 Gould Street in Columbus. Joiner typed the information she received from the VA nurse into CPD's dispatch computer system, which could be accessed by other CPD 911 workers, including 911 shift supervisor Frances McDaniel. Joiner's initial comments stated that Zachary was contemplating suicide, although the statement was later retracted and changed to "psychiatric." (McDaniel Dep. 22:8-23:18.) Joiner's initial comments also stated that Zachary had guns in his house. (*Id.* 24:3-13.) McDaniel relayed the information provided by Joiner to CPD officers.

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[3] Plaintiffs contend that Zachary never told the VA nurse he had guns, but Plaintiffs offer no evidence in support of this contention.

[4] Plaintiffs object to Defendants' use of the 911 Transcript, arguing that it is hearsay and that it has not been properly authenticated. The Court rejects these arguments. Defendants produced evidence that the 911 tape was transcribed to the best of the transcriptionist's ability and that CPD kept the 911 Transcript in the ordinary course of business. (Gasaway Aff. ¶¶ 4-5, Sept. 4, 2008; Rowe Aff. ¶ 3, Sept. 12, 2008.)

III. Dispatch of Columbus Officers to Zachary's House

CPD dispatchers sent a fire engine, an ambulance and two police units to Zachary's location, 2420 Gould Street in Columbus. In addition, Officer Seth Graham, who was not officially dispatched, responded to dispatch to say he was close to the house, and he went over to the house. McDaniel, who dispatched the police officers, stated over the police radio[5] that it was a psychiatric problem and that the caller had dreams of "seventy one hundred," which means homicide. McDaniel told the officers that Zachary had a gun in the residence. (911 Tr. 5.) McDaniel ran a computer history on Zachary, and she found one Lester Zachary in the system. The report gave Zachary's birth date and stated that Zachary was a black male. It also came back with a caution highlight, meaning that Zachary was dangerous.[6] (*E.g.*, McDaniel Dep. 26:15-23.) McDaniel ran a computer history on the Gould Street address and found that someone named Lester had called 911 in February 2008 regarding domestic violence with a weapon. (*Id.* 33:1-25.) McDaniel stated over the police radio that there was a Lester Zachary in the system and that the report said he was dangerous. (911 Tr. 17.)

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[5] All of the officers responding to the scene had access to the police radio communications.

[6] Plaintiffs contend that the report does not show that Zachary was dangerous, but it is undisputed that McDaniel told the police officers over the radio that Zachary was dangerous. (*See* 911 Tr. 17.)

IV. 911 Communication with Zachary

Joiner, the 911 call taker, contacted Zachary by telephone at 3:15, using the number the VA nurse gave her as Zachary's number. (*Id.* at 5.) Joiner told Zachary that she was calling from 911 and that she had received a call from the VA nurse. Zachary acknowledged that he had spoken with the VA nurse and told Joiner that he was still alive, that the dreams were back and that he did not want to talk to 911 about it. (*Id.* at 5-6.) He hung up the telephone. At 3:17, McDaniel contacted Zachary by telephone. Zachary said "Look here, ma'am. You tell these guys in front my door, I'm . . . I'm going to start shooting. I'll start shooting . . . get these guys out from my door, man."[7] (*Id.* at 7.) McDaniel called Officer Graham, whom she believed to be closest to the scene, to tell him to stand back because Zachary was threatening to shoot. (*Id.* at 8.) She also announced over the police radio that Zachary was threatening to shoot if the responders did not move away. (*Id.* at 9; Graham Dep. 40:25-41:7, Jan. 18, 2008.) While he was on his way over to the scene, Hudson heard McDaniel say that Zachary was threatening to shoot if officers did not leave his property. (Hudson Dep. 103:2-6, Jan. 8, 2008.)

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[7] Plaintiffs contend that Zachary never said anything about shooting anyone, citing the unsworn police statement of Helen Stephens, who was with Zachary on the night of the incident and did not hear him say such things. (Ex. 5 to Pls.' Statement of Disputed Material Facts at 21, Helen Stephens Statement, Apr. 13, 2005 [hereinafter Stephens Statement].) However, Stephens also stated that she was not in the same room as Zachary during the entire incident. (*Id.* at 17-18.) When asked about the incident under oath, Stephens did not recall anything about the evening in question—not the shooting, not the police coming to the house, not the 911 calls. (Stephens Dep. 37:6-24; 38:25-39:25, Feb. 20, 2008.) In any event, it is undisputed that McDaniel told CPD officers over the police radio that Zachary threatened to start shooting. (911 Tr. 8.)

At 3:29, McDaniel called Zachary and asked for "Lester," and Zachary said, "yes sir." (911 Tr. 20.) McDaniel, referred to Zachary by his first name, Lester, several other times during the conversation. McDaniel asked Zachary what was wrong. Zachary replied, "Nothing wrong, baby. Nothing wrong, I'm fine." McDaniel, who had learned that the telephone was registered to Helen Stephens, asked if Stephens was there. When Zachary replied that she was, McDaniel asked to speak with her. Zachary initially refused but then put Stephens on the phone. Stephens told McDaniel that she was Zachary's wife, that Zachary was okay and that Zachary did not have a gun. Stephens also said she was not feeling threatened, that she would put up the dog, which was chained to the porch, and that she would open the door for police. At 3:30, McDaniel stated over the police radio that she had made contact with Zachary's wife, that the wife said there was no gun in the house, that Zachary had calmed, and that the wife would open the door for the officers.

V. The Stand-Off

While 911 was communicating with Zachary and Stephens, Hudson arrived at 2420 Gould Street, established a perimeter and attempted to start a dialogue with Zachary. At least eight officers, including Coats and Touchberry, responded to the scene. Zachary came out on the open front porch at 3:31 but then went back inside. Zachary came out on the porch again at 3:32, waving his hands in the air and pacing on the porch. He lifted up his shirt and told officers that he did not have a gun. Zachary repeatedly told the officers that he had done nothing wrong and to get off his property, and he told them several times that he did not have a gun, although some of the officers testified that Zachary was also "ranting and raving incoherently." (*E.g.*, Hudson Dep. 120:15-17.) It is undisputed that Zachary did not yell any threats at the officers on the scene and that the officers on the scene did not see a weapon in Zachary's hands. The officers did, however, suspect that a gun could be hidden somewhere on the porch or just inside the front door. It is undisputed that a large dog remained chained on the porch and that no officers attempted to go up on the porch. According to Hudson, Zachary said that the dog would bite. (Hudson Dep. 119:1-3.) Zachary never set the dog on the officers or moved to unchain the dog, although he was at times close to the dog.

Stephens came down from the porch to speak with Hudson. Stephens told Hudson that Zachary had been drinking but that everything was all right, that there were no weapons in the house, and that she did not feel threatened. She also told Hudson that there was a fourteen-year-old in the back bedroom of the house.[8] (Hudson Dep. 135:24-25.) Hudson did not believe Stephens when she said that she was not in danger. (Hudson Dep. 135:4-20.) Hudson relayed the substance of this conversation over the police radio and told Touchberry about the conversation. At 3:33, Hudson called back to 911 over the police radio and asked McDaniel exactly what Zachary had said to the VA nurse, and McDaniel reported that Zachary told the VA nurse that "he was having dreams of killing children, and that he has . . . [a] gun in the home." (911 Tr. 26.) Hudson responded over the radio that the wife said there was no gun, that she did not feel threatened and that she had not heard Zachary make any threats. Hudson then asked McDaniel whether Zachary told her he was going to start shooting, and McDaniel replied that he had. (*Id.*)

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[8] Plaintiffs argue that Stephens never said anything about a child being in the house, citing Stephens's unsworn police statement. However, even in that statement, Stephens stated that she told officers that Zachary was not "threatening the baby." (Stephens Statement 21.)

At 3:37, both Zachary and Stephens were on the porch. Zachary yelled out to the officers that "this is over with" and that he was going to bed. Zachary held Stephens by her upper arm and "ushered" her back into the house and shut the door. There is no evidence in the present record that the officers ordered Zachary to come down from the porch or that Zachary disobeyed an order from the officers.

VI. The Shooting

Hudson and Touchberry conferred and decided to use a beanbag munition.[9] Hudson told Coats that if Zachary came out of the house again, he should deploy a beanbag munition at Zachary.[10] A beanbag munition is a small cloth sack sewn shut around lead pellets, with sections of the sack made into small trailers that cause the beanbag to fly in a stabilized trajectory. CPD deploys beanbag munitions using a Remington 870 shotgun. Touchberry instructed Coats where to position himself. Neither Touchberry nor Hudson gave Coats a specific instruction regarding where on Zachary's body to aim the beanbag munition.

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[9] According to Hudson, he and Touchberry decided to use the beanbag munition because they were concerned that Zachary would harm Stephens or the child. According to Coats, Hudson and Touchberry said not to let Zachary back in the house because they were not sure if he would come out again. (Coats Dep. 178:11-16, Mar. 28, 2008.) They did not discuss an alternative to the beanbag munition, such as pepper spray.

Hudson and Touchberry called for Zachary to come back out of the house. Zachary came out onto the porch at approximately 3:41, and Coats was positioned about 20 or 21 feet from Zachary. Hudson and Touchberry called out for Coats to take a shot. Zachary's lower body was obscured by the porch railing. According to Coats, he targeted Zachary's left shoulder blade. However, the shot hit Zachary in the spleen area.[11] Zachary fell down onto a couch on the porch, but he tried to get up. Coats took another shot and hit Zachary in the upper left chest. Zachary fell to the floor and stayed down.

VII. The Aftermath

After the second shot, Hudson and Touchberry scaled over the porch railing and took Zachary into custody. Zachary, who did not appear to be bleeding externally and was able to walk on his own, was handcuffed and taken to the hospital in a squad car. Zachary was charged with making terroristic threats in violation of O.C.G.A. § 16-11-37, based on his statements to the 911 operator that he would start shooting if the responders did not leave his property. Defendants do not appear to dispute that the arresting officers did not have personal knowledge of the conversations between Zachary and the VA nurse or Zachary and CPD 911 personnel. Defendants do not dispute that the officers did not obtain a warrant before deploying the beanbag munition. It is undisputed that Boren did not know about the shooting until several hours after it occurred.

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[10] Plaintiffs contend that Coats failed his shooting exercises and thus should not have been the one to deploy the beanbag munition. However, Defendants presented unrebutted evidence that Coats scored well on all of his shooting exercises. (Bolen Aff. ¶¶ 6-7 & Ex. 1, Sept. 15, 2008.)

[11] Coats contends that Zachary moved, so even though Coats aimed for the shoulder blade he hit the spleen area.

Zachary died at the hospital on April 6, 2005. A Georgia Bureau of Investigation medical examiner conducted an autopsy and concluded that the cause of Zachary's death was "internal bleeding due to blunt force trauma of the spleen due to impact from a beanbag (fired from a gun)." (Ex. 2 to Lehman Dep., Mar. 25, 2008, Autopsy Official Report 6.) The medical examiner also found that one of Zachary's ribs was broken and that Zachary had abrasions where the beanbags hit him.

Hudson and his supervisor, Lt. Gordon Griswould, prepared a use of force report documenting the April 4 shooting. The CPD Office of Professional Standards ("OOPS") investigated the shooting. Hudson and Coats were placed on administrative leave pending the outcome of the investigation. Following the investigation, OOPS submitted a report of the incident to Chief Boren, recommending that the officers be exonerated.

VIII. CPD Policies

A. CPD Use of Force Policy

According to CPD policy, officers should use only the minimum force necessary to perform their duties effectively. CPD has a "Force Continuum" that "provides a series of responses which are available for officers when confronting a subject." (Ex. 2 to Boren Dep., Apr. 21, 2008, CPD General Order on Non-Deadly Force/Less Lethal Munitions § 3-1.7.) The force continuum ranges from Level One, "Officer Presence," to Level Seven, "Deadly Force." The use of less lethal munitions is Level Six, one step below deadly force. (*Id.*) Officers are directed to consider the totality of the circumstances in determining how to respond to a situation, including the age, sex, size, skill level and number of officers and/or subjects. The officers should also evaluate additional factors, including proximity to a firearm, ground position and imminent danger.

According to CPD policy, "less lethal munitions," including the beanbag munition "are designed to incapacitate hostile subjects without causing death or serious injury." (Ex. 6 to Bolen Dep. 5, Feb. 21, 2008, CPD Order on Less Lethal Munitions § 3-1.9 ¶ A [hereinafter CPD LLM Order].) The policy notes that the use of less lethal munitions "may result in serious injury and/or death even when properly deployed." (*Id.*) Only officers who have trained and qualified with less lethal munitions may deploy them. The policy provides that situations that may be suitable for deployment of less lethal munitions include "subjects who are armed with a knife or similar weapon where there is not an immediate threat to the officer or a third person" and "persons who may be armed with a knife, firearm, or other weapon who may attempt to force an officer into using deadly force in order to achieve their suicide." (*Id.* at 8 ¶ D.)

B. CPD "Less Lethal Munitions" Training

Bolen created CPD's "Less Lethal Munitions" training regarding the beanbag munition. To prepare for this job, Bolen attended a Specialty Impact Munitions Instructor Training Course at Armor Holdings ("Armor"), where he received training materials on how to structure and develop policies and guidelines for beanbag munitions. These Armor materials provided guidelines and recommendations concerning the distance and targeting of the beanbag munition, based upon Armor's research. Bolen was certified as an instructor to train officers on use of the beanbag munitions.[12]

Bolen's training program was released in May 2001. The training stated that "extreme caution" should be exercised at distances of less than ten feet "due to the high possibility of a fatal outcome." (CPD LLM Order 3.) The training also stated that at distances of ten to twenty feet, officers should "avoid the head, neck, spleen, liver, and kidney areas," although the training did not include any explanation of where the liver, spleen and kidneys are located. (*Id.*) The training further provided that at distances of twenty to forty feet, "the target area should be the center mass."[13] (*Id.*) In contrast, the Armor Holdings 2003 Specification Manual[14] recommends that at distances of ten to twenty feet and twenty to thirty feet officers should target "lower extremities *unless deadly force is warranted*." (Ex. 10 to Bolen Dep. 6, 2003 Armor Holdings Specification Manual [hereinafter 2003 Armor Manual] (emphasis added).) The Armor training materials Bolen received in 2000 did state that while the buttocks and thigh were the primary target areas, secondary target areas included muscle areas, including the shoulder, biceps, triceps and forearm area. (Ex. 1 to Bolen Aff. 15, July 9, 2008, 2000 Armor Holdings Manual [hereinafter 2000 Armor Manual].) Still, the Armor training emphasizes that life supporting organs susceptible to damage from impact "should be AVOIDED unless it is the intent to deliver deadly force." (*Id.* at 16.) The Armor training further states that the center mass is a "last resort" target area and should be used "to meet a level of threat escalating to deadly force justification." (*Id.* at 15.) The Armor training also states that shots to the center mass "have the highest potential to cause serious injury or death." (*Id.* at 16.)

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[12] Bolen's certification expired on February 28, 2002. He was not recertified until May 6, 2005.

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[13] Later in the CPD training, there is a section called "aiming point," which instructs officers, "The closer you are, the lower the aiming point." (CPD LLM Order 10.) The training warns to avoid the head, neck, spine, groin and life supporting organs "unless it is the intent to deliver deadly force." (*Id.*) Finally, the training notes that "[s]hots to the 'center mass' provide for the highest probability of serious injury or death." (*Id.*)

[14] Again, Bolen's Armor Holdings certification expired on February 28, 2002. He was not recertified until May 6, 2005. Bolen did not update the CPD training materials during the time when his certification had lapsed.

IX. Plaintiffs' Claims

Plaintiffs bring the following claims: (1) § 1983 claim against Defendants for unreasonable seizure in violation of the Fourth Amendment (3d Am. Compl. ¶¶ 49-55 [hereinafter Compl.]); (2) § 1983 claim against Defendants for excessive force in violation of the Fourth Amendment (*Id.*); (3) substantive due process claim against Defendants (*Id.* ¶¶ 56-67); (4) civil conspiracy claim against Coats, Hudson and Touchberry (*Id.* ¶¶ 68-78); (5) First Amendment claim against Defendants (*Id.* ¶¶ 79-88); (6) equal protection claim against all Defendants except Bolen (*Id.* ¶¶ 89-96); (7) assault and battery claim against Coats, Hudson and Touchberry (*Id.* ¶¶ 97-100); (8) "intentional tort" and "malicious negligence" claim against Defendants (*Id.* ¶¶ 101-103); (9) false arrest claim against Coats, Hudson and Touchberry (*Id.* ¶¶ 107-109); (10) false imprisonment claim against Boren, Coats, Hudson and Touchberry (*Id.* ¶¶ 110-112); and (11) intentional infliction of emotional distress claim against Coats, Hudson and Touchberry (*Id.* ¶¶ 113-118).

DISCUSSION

I. § 1983 Fourth Amendment Claims

To prevail on a § 1983 claim, Plaintiffs must prove that Defendants, acting under color of state law, deprived Zachary of a right, privilege, or immunity secured by the Constitution or a federal law. *See* 42 U.S.C. § 1983. It is undisputed that the officers acted under color of state law during the April 4, 2005 incident. Plaintiffs contends that the officers violated Zachary's Fourth Amendment rights to be free from unreasonable search and seizure and from the use of excessive force.

A. § 1983 Standards

Plaintiffs make their § 1983 Fourth Amendment claims against the individual officers who were on the scene, against the supervising and training officers, and against Columbus. Because the different classes of defendants assert different defenses, the Court will briefly examine the basic principles of each defense.

1. *Individual Capacity Claims and Qualified Immunity*

Plaintiffs' individual capacity claims against Hudson, Coats and Touchberry are based upon their direct involvement in the April 4, 2005 incident. Plaintiffs' individual capacity claims against Boren and Bolen, who were not on the scene, are based upon a theory of supervisory liability, discussed more fully below. All of these individual defendants contend that they are entitled to qualified immunity.

Qualified immunity shields public officers acting within the scope of their discretionary authority from liability so long as their acts do not violate clearly established law. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation . . . protecting from suit 'all but the plainly incompetent or one who is knowingly violating the federal law.'" *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quoting

Willingham v. Loughnan, 261 F.3d 1178, 1187 (11th Cir. 2001)).

To receive qualified immunity, an officer must show that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Lee*, 284 F.3d at 1194 (internal quotation marks omitted). Here, Plaintiffs do not appear to dispute that the officers were acting within their discretionary authority during the events giving rise to this action. Therefore, Plaintiffs must meet their burden to show that qualified immunity is not appropriate. *See id.* To meet this burden, Plaintiffs must first show that, taken in the light most favorable to Plaintiffs, the facts show that the officers' conduct violated a constitutional right. *Hadley v. Gutierrez*, 526 F.3d 1324, 1329 (11th Cir. 2008) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If Plaintiffs do not make this showing, there is no need for further inquiry. *See Lee*, 284 F.3d at 1194. If the facts viewed in the light most favorable to Plaintiffs *do* establish a violation of a constitutional right, the Court must determine if the right was clearly established at the time of the officers' conduct. *Hadley*, 526 F.3d at 1329 (citing *Saucier*, 533 U.S. at 201). A right is clearly established if it is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739 (internal quotation marks omitted); *accord Saucier*, 533 U.S. at 202. The unlawfulness of the action must be apparent in light of pre-existing law, but the very action in question need not have been previously held unlawful. *Hope*, 536 U.S. at 739.

Since qualified immunity provides an immunity from suit, qualified immunity questions should be resolved at the earliest possible stage in litigation. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). However, the protection of qualified immunity is only warranted at the summary judgment stage if the defendant officers can "establish that there is no genuine issue of material fact preventing them from being entitled to qualified immunity." *Johnson v. Breeden,* 280 F.3d 1308, 1317 (11th Cir. 2002). "[I]f the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial." *Id.*

2. *Supervisory Liability*

As to Plaintiffs' claims against the supervisors, supervisory officials may not be held liable under § 1983 on the basis of respondeat superior or vicarious liability. *Danley v. Allen*, 540 F.3d 1298, 1314 (11th Cir. 2008). Rather, supervisory liability under § 1983 occurs "either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation." *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003). A causal connection "can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so." *Id.* (internal quotation marks omitted). "The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences." *Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990). A plaintiff can also establish a causal connection by showing that the facts support "an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Cottone*, 326 F.3d at 1360 (internal quotation marks omitted).

3. Municipal Liability

Regarding Plaintiffs' claims against Columbus, Plaintiffs must show that Zachary suffered a constitutional violation as a result of the City's unlawful "policy or custom." *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1145 (11th Cir. 2007); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). "'A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said to be acting on behalf of the municipality. . . . A custom is a practice that is so settled and permanent that it takes on the force of law.'" *Cooper v. Dillon*, 403 F.3d 1208, 1221 (11th Cir. 2005) (quoting *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997)). Only "those officials who have final policymaking authority may render the municipality liable under Section 1983." *Brown v. Neumann*, 188 F.3d 1289, 1290 (11th Cir. 1999) (per curiam) (internal quotation marks and emphasis omitted). Final policymaking authority may be delegated, but for the municipality to be liable under a delegation theory "the delegation must be such that the subordinate's discretionary decisions are not constrained by official policies and are not subject to review." *Id.*

B. § 1983 Unreasonable Seizure Claim

Plaintiffs' first claim is that the officers violated the Fourth Amendment by arresting Zachary for violating Georgia's terroristic threats statute without probable cause.[15] The Fourth Amendment gives individuals the right to be free from "unreasonable searches and seizures." There is no dispute in this case that Zachary was "seized" within the meaning of the Fourth Amendment when he was shot with the beanbag munition, then arrested. The reasonableness of an arrest is "determined by the presence or absence of probable cause for the arrest." *Skop*, 485 F.3d at 1137. "'Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime.'" *Id.* (quoting *United States v. Floyd*, 281 F.3d 1346, 1348 (11th Cir. 2002) (per curiam)). "This probable cause standard is practical and non-technical, applied in a specific factual context and evaluated using the totality of the circumstances." *Id.* (citing *Maryland v. Pringle*, 540 U.S. 366, 370 (2003)).

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[15] Plaintiffs also contend that the officers violated the Fourth Amendment by arresting Zachary without a warrant, citing authority regarding arrests made *inside* a suspect's home. While arrests inside a person's home may not, under the Fourth Amendment, be made without a warrant or exigent circumstances, *see Payton v. New York*, 445 U.S. 573, 590 (1980), it is undisputed that Zachary was on the front porch, not inside the home, when he was shot with the beanbag munition and arrested, so the in-home arrest line of cases does not apply. *See United States v. Watson*, 273 F.3d 599, 602 n.2 (5th Cir. 2001) ("An arrest on a porch is not considered 'inside' the house for purposes of determining its constitutionality under the Fourth Amendment."); *see also Payton*, 445 U.S. at 590 ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

With regard to the individual capacity claims against the arresting officers—Hudson, Coats and Touchberry—the relevant question for qualified immunity purposes is not whether the officers had probable cause but whether they had arguable probable cause to arrest Zachary. "Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[s] could have believed that probable cause existed to arrest." *Lee*, 284 F.3d at 1195 (internal quotation marks omitted). "This standard recognizes that law enforcement officers may make reasonable but mistaken judgments regarding probable cause but does not shield officers who *unreasonably* conclude that probable cause exists." *Skop*, 485 F.3d at 1137.

Whether an arresting officer possesses probable cause (or arguable probable cause) "depends on the elements of the alleged crime and the operative fact pattern." *Id.* at 1137-38 (internal citation omitted). Here, the officers contend that they had probable cause to arrest Zachary for making terroristic threats in violation of O.C.G.A. § 16-11-37(a), which provides: "A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence . . . with the purpose of terrorizing another . . . or in reckless disregard of the risk of causing such terror . . . ." The crime of terroristic threats "is completed when the threat is communicated to the victim with the intent to terrorize." *Armour v. State*, 265 Ga. App. 569, 571, 594 S.E.2d 765, 767 (2004). The message need not be directly communicated to the victim if the threat is made "in such a way as to support the inference that the speaker intended or expected it to be conveyed to the victim." *Id.* (emphasis omitted); *cf. Richards v. State*, 286 Ga. App. 580, 582, 649 S.E.2d 757, 750-51 (2007) (finding valid search of home based on police dispatcher's report of a 911 call regarding a child being beaten and officers' on-the-scene corroboration with neighbors who said a child was being beaten—despite occupants' insistence that there was no child in the home).

As a preliminary matter, Plaintiffs dispute that Zachary was the person who made threats over the telephone to the 911 dispatcher. However, the officers on the scene reasonably concluded that Zachary was the same person who told McDaniel he would start shooting the responders in front of his house. When the officers arrived on the scene at the address the VA nurse gave as Zachary's address, the set of facts before them was congruent with the information being provided to them by McDaniel over the police radio.[16] Zachary matched the description McDaniel had given the officers based on McDaniel's computer search. The officers observed Zachary go in and out of the house, yell at them and, according to some officers, rant and rave incoherently. This, combined with the presence of Helen Stephens and the dog chained to the porch, reasonably led the officers on the scene to conclude that Zachary was the same person who had been speaking with McDaniel, Joiner and the VA nurse.

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[16] McDaniel reasonably concluded that it was Lester Zachary who had made the threat to start shooting. Joiner and McDaniel both called the telephone number given to them by the VA nurse as Zachary's number, and the male who answered acknowledged speaking with the nurse and said that the nightmares were back. (911 Tr. 6.) When McDaniel asked for Lester, the male who answered said, "Yes, sir" and did not correct McDaniel when she referred to him as Lester. (*Id.* at 20.) The male also confirmed that police were outside his house at the address the VA nurse had given to Joiner as Zachary's address. (*Id.* at 21-22.)

The next question is whether a reasonable officer on the scene and possessing the same knowledge as Hudson, Coats and Touchberry could have reasonably believed that Zachary had made a terroristic threat. Based on McDaniel's communications, the officers knew that (1) when McDaniel contacted Zachary by telephone, Zachary told her to let the responders in front of his door know that he would start shooting them if they did not move away, (2) Zachary was having dreams of killing people, (3) Zachary may have a loaded gun inside the house, and (4) the computer report flagged Zachary as "dangerous." As discussed above, based on their own observations at the scene, the officers reasonably believed that Zachary was the same person who had threatened to start shooting the responders. Although Zachary made no threats directly to the officers and told the officers that he did not have a weapon, the crime of terroristic threats was completed when the threat was communicated to the officers, *see Armour*, 265 Ga. App. at 571, 594 S.E.2d at 767, and it was reasonable for McDaniel and the officers to construe Zachary's statements to McDaniel as a threat to inflict harm upon the responders standing outside of Zachary's house if those responders did not leave.[17]

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[17] Plaintiffs also contend that Zachary was justified in making the threat under O.C.G.A. § 16-3-23, which permits a person to use the threat of force to prevent *unlawful* entry or attack on a

Based on all of this, the Court concludes that Hudson, Coats and Touchberry had at least arguable probable cause to arrest Zachary for making a terroristic threat. Therefore, Hudson, Coats and Touchberry are entitled to summary judgment based on qualified immunity as to Plaintiffs' Fourth Amendment unreasonable seizure claim. Furthermore, Plaintiffs have pointed to no basis for holding Boren or Bolen individually liable. Even if the officers on the scene did not have probable cause to arrest Zachary, it is undisputed that neither Boren nor Bolen was on the scene, and Plaintiffs have pointed to no causal connection between their actions and the officers' decision to arrest Zachary for making a terroristic threat. Accordingly, Boren and Bolen are entitled to summary judgment based on qualified immunity as to Plaintiffs' Fourth Amendment unreasonable seizure claim. Finally, Columbus is entitled to summary judgment on Plaintiffs' Fourth Amendment unreasonable seizure claim because Plaintiffs have pointed the Court to no policy or custom that was the moving force behind the officers' decision to arrest Zachary for making a terroristic threat.

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habitation. Since the officers had at least arguable probable cause to arrest Zachary for making a terroristic threat, their presence at the scene was not unlawful, and Zachary was therefore not justified in making the threat.

C. § 1983 Excessive Force Claim

1. Liability of Officers Hudson, Coats and Touchberry

Plaintiffs also contend that the officers used excessive force when they shot Zachary with the beanbag munition. This claim must be analyzed under the Fourth Amendment's objective reasonableness standard. *Jackson v. Sauls*, 206 F.3d 1156, 1169 (11th Cir. 2000) (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)). The right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396. The use of force must be judged on a case-by-case basis "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* Defendants do not seriously dispute that there is at least a fact question that shooting Zachary with the beanbag munition in the upper torso, hitting him in the spleen area, constituted deadly force.[18] It is clear that a beanbag munition can be used as deadly or non-deadly force, depending on the shooter's distance from the subject and where the subject is hit. Here, based on Coats's distance from Zachary and the fact that Coats targeted Zachary's upper body, hitting Zachary in the spleen area, a jury could conclude that Coats used deadly force. Furthermore, a jury could conclude that Hudson and Touchberry ordered Coats to use deadly force because although neither Hudson nor Touchberry told Coats *where* to shoot Zachary, they did order him to shoot Zachary with the beanbag munition, and they did tell Coats where to stand so that he would be within 20-25 feet of the porch and at a vantage point that required Coats to target Zachary's upper body because Zachary's lower extremities were obscured by the porch railing. Therefore, the key question is whether the officers had probable cause to use deadly force.

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[18] Coats contends that he did not intend to hit Zachary in the spleen. However, Coats *did* hit Zachary in the spleen, creating a jury question as to whether he intended to do so. In any event, it is undisputed that Coats aimed at Zachary's upper body from a distance of 20 or 21 feet, though Armor's training materials advise that from that distance only lower extremities should be targeted unless deadly force is warranted. (2003 Armor Manual 6.)

Deadly force is "'not constitutionally unreasonable to prevent escape'" where "'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]'" *Long v. Slaton*, 508 F.3d 576, 580 (11th Cir. 2007) (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). Therefore, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Garner*, 471 U.S. at 11-12.[19] In contrast, "[a] police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Garner*, 471 U.S. at 11.

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[19] The Court recognizes that *Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force,'" *Scott v. Harris*, 550 U.S. 372, ___, 127 S. Ct. 1769, 1777 (2007), but *Garner* does supply a Fourth Amendment "reasonableness" test that the Court finds is appropriate for analyzing the particular type of force used in the particular situation confronting the officers in this action.

Here, viewing the facts in the light most favorable to Plaintiffs as the Court must do in analyzing a motion for summary judgment, the Court concludes that the officers' use of force was not objectively reasonable under the Fourth Amendment. It is true that the officers were aware that Zachary had told either the VA nurse or 911 that he had guns, and they were aware that he told McDaniel that he would start shooting if the responders did not leave. That information is mitigated, however, by a number of other facts collected by the officers during the twenty or so minutes they were on the scene after the telephonic threat to McDaniel but before the shooting. Zachary never made any threats directly to the officers, and he never threatened Stephens or anyone else in front of the officers. None of the eight officers on the scene saw a weapon in Zachary's hands or on his person. The officers knew that Zachary was a "psychiatric" case. Zachary repeatedly told the officers he had no weapons, and he lifted his shirt to show them that there was no weapon in his waistband. Stephens told both 911 and the officers on the scene that she did not feel threatened, that Zachary did not have a gun, and that Zachary had calmed. Zachary came out onto the porch at least three times. Each time, Zachary went back into the house, but each time, he returned to the porch unarmed and telling officers that he was unarmed. Before he went into the house for the last time, Zachary told the officers he was going to bed. After that, Zachary complied with the officers' requests for him to come back outside, and Zachary was still unarmed.

Weighing all of these facts, a jury could conclude that a reasonable officer on the scene possessing the same facts as Coats, Hudson and Touchberry would not have had a reasonable belief that deadly force was warranted under the circumstances. Zachary was intoxicated and loud, but he did not directly threaten the officers, and the officers never saw a weapon in Zachary's hands or on his person during their twenty or so minutes on the scene before the shooting. Furthermore, the officers' own actions—deploying a beanbag munition instead of shooting Zachary with a lethal munition—suggest that the officers on the scene actually did not believe deadly force was warranted. The officers contend that they did not intend to kill Zachary; the CPD use of force continuum categorizes the beanbag munition as non-deadly force; and the officers were trained that the beanbag munition is "designed to incapacitate hostile subjects without causing death or serious injury." (CPD LLM Order 5.)

For all of these reasons, the Court finds that genuine issues of material fact exist as to whether Hudson, Coats and Touchberry had arguable probable cause to use deadly force against Zachary. The Court further finds that the law at the time of the shooting clearly established that deadly force is not permitted unless the officers have probable cause to use deadly force. *See Garner*, 471 U.S. at 11-12. Therefore, the Court cannot decide at this stage whether Hudson, Coats and Touchberry are entitled to qualified immunity because certain fact issues must be decided by a jury. *See Breeden*, 280 F.3d at 1317 ("[I]f the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial."). The Court emphasizes that it has *not* found that the officers are not entitled to qualified immunity. The jury may well find that Plaintiffs' version of the facts is not true and that the officers did have arguable probable cause to use deadly force. In that case, the officers will be entitled to qualified immunity. However, because genuine issues of material fact exist, that determination is premature and cannot be made based upon the pretrial record.

2. *Columbus Liability*

Plaintiffs contend that the officers used excessive force against Zachary because the City failed to train the officers properly on the use of the beanbag munition. "A failure to adequately train municipal employees constitutes an actionable policy or custom for § 1983 purposes 'only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact.'" *Cook ex rel. Estate of Tessier Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1116 (11th Cir. (alteration in original) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)). Here, Plaintiffs point to the CPD's written "Less Lethal Munitions" training program as evidence of the policy of failing to train officers adequately on the beanbag munition. CPD delegated the task of creating the "Less Lethal Munitions" training to Bolen, and though the "Less Lethal Munitions" training had to fit within CPD's Use of Force policy, the "Less Lethal Munitions" training was based on Bolen's own research, consisting chiefly of Armor's Specialty Impact Munitions Instructor Training Course. There is no evidence in the present record that anyone above Bolen in the chain of command reviewed the training program or made substantive changes to it. Based on the present record, the facts viewed in the light most favorable to Plaintiff suggest that Bolen was the City's final policymaker for purposes of formulating the "Less Lethal Munitions" training. *See Brown*, 188 F.3d at 1290 (discussing delegation of final policymaking authority). Even if Bolen were not the City's final policymaker and the "Less Lethal Munitions" training is not an officially adopted City policy, the fact that it is the written, official basis for CPD's training on the beanbag munition suggests that it is at least a "practice that is so settled and permanent that it takes on the force of law." *Cooper*, 403 F.3d at 1221 (internal quotation marks omitted).

Having found that a jury could conclude that the "Less Lethal Munitions" training constitutes the City's policy or custom regarding use of the beanbag munition, the Court next considers whether the training amounts to deliberate indifference to the rights of persons with whom the officers using the beanbag munition come into contact. To establish deliberate indifference, Plaintiffs must show that Columbus had subjective knowledge of a risk of serious harm but disregarded that risk by conduct that is more than mere negligence. *Cook*, 402 F.3d at 1115. Here, Columbus knew—because the person Columbus delegated to develop the "Less Lethal Munitions" training knew, based on the Armor training Bolen received—that death was a serious risk of shooting a suspect in the spleen or center mass, even from distances greater than twenty feet. (*See* 2000 Armor Manual 16 (noting that impact to life supporting organs "should be AVOIDED unless it is the intent to deliver deadly force" and that shots to the center mass "have the highest potential to cause serious injury or death"); *see also* 2003 Armor Manual 6 (recommending that at distances of ten to thirty feet officers should target "lower extremities unless deadly force is warranted").[20]) Therefore, Columbus knew that officers should not deploy a beanbag munition toward a suspect's spleen or center mass from a distance less than thirty feet unless deadly force was authorized. Accordingly, Columbus had an obligation to reasonably assure that its police officers did not shoot someone in the spleen or center mass if deadly force was not authorized.

Nonetheless, when Bolen created CPD's "Less Lethal Munitions" training, he instructed officers that at distances of twenty to forty feet—the range at issue in this action—"the target area should be the center mass."[21] (CPD LLM Order 3.) The CPD training does not, however, explain that the center mass should only be targeted if deadly force is authorized. This instruction is the *opposite* of Armor's guidelines and recommendations concerning the distance and targeting of the beanbag munition, which are based upon Armor's research. According to Armor, the primary target areas should be the buttocks and thigh; the secondary target areas should be muscle areas such as the shoulder, biceps, triceps and forearm; and the center mass is a "last resort" target area and should be used "to meet a level of threat escalating to deadly force justification." (2000 Armor Manual 15.) Again, the Armor training warned that shots to the center mass "have the highest potential to cause serious injury or death" and that impact to life supporting organs "should be AVOIDED unless it is the intent to deliver deadly force." (*Id.* at 16.) Bolen argues that any discrepancies between his training and the Armor recommendations are inadvertent, but the fact that Bolen's training recommends targeting the center mass in spite of Armor's specific admonition to avoid the center mass unless deadly force is authorized gives rise to a jury question on the question whether Bolen, and therefore Columbus, disregarded a risk of serious harm by conduct that is more than mere negligence. For these reasons, the Court denies the City's motion for summary judgment as to Plaintiffs' Fourth Amendment excessive force claims.

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[20] It is undisputed that Bolen did not have the 2003 Specification Manual when he created the CPD "Less Lethal Munitions" training. It is also undisputed that Bolen did not attend any re-certification training or update the CPD "Less Lethal Munitions" training between the time his Armor training certification expired and 2002 and when he renewed it in May of 2005. Even ignoring the 2003 manual's admonition to target lower extremities unless deadly force is warranted, the 2000 manual clearly informed Bolen of the substantial risk of death if officers were to target a life supporting organ or the center mass with a beanbag munition.

[21] Bolen also instructed officers that at distances of ten to twenty feet, officers should "avoid the head, neck, spleen, liver, and kidney areas," but Bolen did not explain where the liver, spleen and kidneys are located so that officers knew which areas to avoid. (CPD LLM Order 3.)

3. Bolen Individual Liability

For the same reasons that a jury could conclude that Columbus was aware of the risk of a serious harm associated with deployment of the beanbag munition toward the center mass or spleen but disregarded that risk by conduct that is more than mere negligence, a jury could conclude that Bolen, in creating CPD's "Less Lethal Munitions" training, was deliberately indifferent to the rights of persons with whom the officers using the beanbag munition come into contact.

The Court further finds that a jury could find a causal connection between Bolen's training and Zachary's injury because there is a fact question as to whether Coats targeted the spleen or center mass even though deadly force was not warranted. As discussed above, at the time of the shooting (and the creation of the training) it was clearly established that deadly force is not permitted unless the officers have probable cause to use deadly force. *See Garner*, 471 U.S. at 11-12. For all of these reasons, at this time, qualified immunity is not appropriate as to Plaintiffs' claims against Bolen because a jury could conclude that he trained officers to aim the beanbag munition at the center mass even when deadly force was not warranted because he told them to target the center mass at distances of twenty to forty feet but did not adequately warn them of the consequences of targeting the center mass from that distance. The Court therefore denies Bolen's motion for summary judgment as to the excessive force claim against him in his individual capacity.

4. *Boren Individual Liability*

Plaintiffs also seek to hold Chief Boren individually liable for excessive force against Zachary. It is undisputed that Boren did not participate in the beanbag shooting or in training the officers on the beanbag munition. Plaintiffs have not pointed to a "history of widespread abuse" that put Boren on notice of the need to correct CPD's "Less Lethal Munitions" policy. *Cottone*, 326 F.3d at 1360. Plaintiffs have also not pointed to any evidence that Boren instructed his subordinates to act unlawfully or knew that they would act unlawfully and failed to stop them from doing so. Accordingly, the Court concludes that Plaintiffs have not pointed to sufficient evidence of a causal connection between Boren's actions and Zachary's shooting. Therefore, Boren is entitled to qualified immunity as to Plaintiffs' excessive force claims against him in his individual capacity.

II. § 1983 Substantive Due Process Claim

Plaintiffs' substantive due process claim is based upon the same facts underlying their unreasonable seizure and excessive force claims. Accordingly, that claim must be analyzed under the Fourth Amendment's objective reasonableness standard, discussed above, rather than a Fourteenth Amendment substantive due process approach. Therefore, Defendants are entitled to summary judgment on the substantive due process claim. *See, e.g., Reese v. Herbert*, 527 F.3d 1253, 1261 n.11 (11th Cir. 2008).

III. First Amendment Claim

In addition to their Fourth Amendment claims, Plaintiffs contend that the officers arrested Zachary in retaliation for Zachary's exercise of free speech, thus violating the First Amendment.[22] To state a retaliation claim, Plaintiffs must show (1) that Zachary's speech was constitutionally protected, (2) that the officers' retaliatory conduct adversely affected the protected speech, and (3) there is a causal connection between the constitutionally protected speech and the retaliatory actions. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

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[22] In their brief, Plaintiffs did not respond to Defendants' arguments in support of summary judgment on the First Amendment Claim. At the motion hearing, Plaintiffs' counsel represented that Plaintiffs had not abandoned their First Amendment claim and that the same arguments Plaintiffs made with regard to the Fourth Amendment unreasonable seizure claim applied to Plaintiffs' First Amendment claim.

The First Amendment "'ordinarily' denies a State 'the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.'" *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring)). However, the First Amendment's protections are not absolute, and "the government may regulate certain categories of expression consistent with the Constitution." *Id.* Therefore, consistent with the Constitution, the government may regulate speech that constitutes a "true threat." *Id.* at 359.

A "true threat" is a statement "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* "'The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Id.* at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. "A communication is a threat when in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *United States v. Alaboud*, 347 F.3d 1293, 1296 (11th Cir. 2003) (alteration in original and internal quotation marks omitted) (explaining what constitutes a "communication" containing a "threat" under 18 U.S.C. § 875(c)). Thus, the government may regulate speech if the speaker intentionally makes the statement and a reasonable person would construe the statement as a serious expression of an intent to inflict bodily harm or death.

Here, the Court cannot find that Zachary's statement to the 911 dispatcher was protected speech When the 911 dispatcher called Zachary, Zachary said, "Look here, ma'am. You tell these guys in front my door, I'm . . . I'm going to start shooting. I'll start shooting . . . get these guys out from my door, man." (911 Tr. at 7.) As discussed above, it was reasonable for McDaniel and the officers to construe Zachary's statements as a threat to inflict harm upon the responders standing outside of Zachary's house if those responders did not leave. Therefore, Zachary's speech was not protected, so Plaintiffs' First Amendment retaliation claim fails, and Defendants are entitled to summary judgment on this claim.

IV. Equal Protection and Civil Conspiracy Claims

Plaintiffs argue that Defendants violated Zachary's Fourteenth Amendment right to equal protection based on his race. To state an equal protection claim, a plaintiff must show that "through state action, similarly situated persons have been treated disparately" and that the Defendants' actions were motivated by race. *Draper v. Reynolds*, 369 F.3d 1270, 1278 n.14 (11th Cir. 2004) (internal citation and quotation marks omitted). Plaintiffs have pointed the Court to no evidence of any *similarly situated* persons who have been treated differently than Zachary. Plaintiffs point the Court to instances in which white suspects were subdued with some type of force other than a beanbag munition, but there is no evidence that any of these white suspects was similarly situated to Zachary in terms of his alleged misconduct, the setting of his arrest or the events leading up to his arrest. Plaintiffs also argue that Defendants' actions were motivated by discriminatory animus, contending that Coats had previously used deadly force against a black suspect but never used deadly force against a white person. This evidence is not sufficient to show that Defendants' actions against Zachary were motivated by race. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' equal protection claim.

Likewise, Defendants are entitled to summary judgment on Plaintiffs' civil conspiracy claim under 42 U.S.C. § 1985(3), which provides a cause of action for a conspiracy to deprive "any person or class of persons of the equal protection of the laws." The elements of a cause of action under § 1985(3) are:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Denney v. City of Albany, 247 F.3d 1172, 1190 (11th Cir. 2001). Plaintiffs contend that Defendants conspired to injure Zachary on account of his race in violation of § 1985(3). However, as discussed above, Plaintiffs have not pointed to sufficient evidence from which a jury could conclude that Defendants' actions against Zachary were motivated by race. Accordingly, the Court grants Defendants' summary judgment motion as to Plaintiffs' civil conspiracy claim.

V. State Law Claims

A. City Liability

To the extent that Plaintiffs assert state law claims against Columbus, the Court finds that Columbus is entitled to summary judgment as to all of Plaintiffs' state law claims because Columbus is entitled to sovereign immunity. The doctrine of sovereign immunity protects governments, including counties,[23] from suit unless they have waived their immunity. *Williams v. Whitfield County*, 289 Ga. App. 301, 302-03, 656 S.E.2d 584, 586 (2008). A county's sovereign immunity "may only be waived by a legislative act which specifically provides that sovereign immunity is waived and the extent of such waiver." *Id.* at 302, 656 S.E.2d at 586 (internal quotation marks omitted). Here, Plaintiffs have not established any waiver of immunity by Columbus, and

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[23] The City is a consolidated city-county government, and the Court views the City as a county for purposes of the sovereign immunity inquiry. *See Bowen v. Columbus*, 256 Ga. 462, 462-63, 349 S.E.2d 740, 741-42 (1986).

Columbus is therefore entitled to summary judgment on Plaintiff's state law claims.

B. Individual Liability

As to Plaintiffs' state law claims against the individual Defendants, Defendants contend that they are entitled to official immunity. A suit against a governmental employee sued in his individual capacity "is barred by official immunity where the public official has engaged in discretionary acts that are within the scope of his or her authority, and the official has not acted in a wilful or wanton manner; with actual malice; or with the actual intent to cause injury." *Brown v. Penland Const. Co.*, 281 Ga. 625, 625-26, 641 S.E.2d 522, 523 (2007). Plaintiffs do not dispute that the individual Defendants were engaging in discretionary acts during the events giving rise to this case.

The next question is whether Defendants acted in a wilful or wanton manner, with actual malice, or actual intent to cause injury. "Actual malice" means "a deliberate intention to do wrong, and does not include 'implied malice,' i.e., the reckless disregard for the rights or safety of others." *Murphy v. Bajjani*, 282 Ga. 197, 203, 647 S.E.2d 54, 60 (2007) (internal quotation marks omitted). A "deliberate intention to do wrong" is "the intent to cause the harm suffered by the plaintiffs." *Id.* Similarly, "actual intent to cause injury" means "an actual intent to cause harm to the plaintiff, not merely an intent to do the act purportedly resulting in the claimed injury." *Kidd v. Coates*, 271 Ga. 33, 33, 518 S.E.2d 124, 125 (1999) (internal quotation marks omitted). The Court examines each of Plaintiffs' state law claims in turn below.

1. "Intentional Tort" and "Malicious Negligence" Claim

In support of their "intentional tort" and "malicious negligence" claim, Plaintiffs contend that Defendants breached their duty as police officers not to use excessive force against Zachary. (*See* Compl. ¶ 102.) Plaintiffs do not cite, and the Court cannot find, any basis in Georgia law for this claim, which is, in any event, duplicative of their Fourth Amendment and battery claims. Defendants are therefore entitled to summary judgment on this claim.

2. False Arrest Claim

To prevail on their claim for false arrest under Georgia law, Plaintiffs must show that Coats, Hudson and Touchberry acted without probable cause and with malice. O.C.G.A. § 51-7-1; *Anderson v. Cobb*, 258 Ga. App. 159, 160, 573 S.E.2d 417, 419 (2002). As discussed above, these Defendants had arguable probable cause to arrest Zachary for violating Georgia's terroristic threats law. Therefore, these Defendants did not act with malice or intent to cause injury when they arrested Zachary, and these Defendants are entitled to official immunity. Thus, Plaintiffs' false arrest claim fails.

3. False Imprisonment Claim

"False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." O.C.G.A. § 51-7-20. Plaintiffs contend that Defendants falsely imprisoned Zachary by arresting him without probable cause and placing him under police supervision at the hospital.[24] "[T]he defense of a warrantless arrest in a false imprisonment case must show that the arrest was made on probable cause and pursuant to the appropriate exigent circumstances." *Arbee v. Collins*, 219 Ga. App. 63, 66, 463 S.E.2d 922, 926 (1995) (citing O.C.G.A. § 17-4-20(a)). "Appropriate exigent circumstances" include (1) offense committed in an officer's presence or within his immediate knowledge, (2) suspect trying to escape, (3) probable cause to believe that an act of family violence has been committed, and (4) "other cause if there is likely to be failure of justice for want of a judicial officer to issue a warrant." O.C.G.A. § 17-4-20(a). As discussed above, Defendants had arguable probable cause to arrest Zachary for violating Georgia's terroristic threats statute. Furthermore, the officers reasonably suspected that Zachary might harm either the officers or someone inside the house if they did not arrest Zachary. Therefore, the Court cannot conclude that there is a genuine issue of material fact that Defendants acted with malice or intent to cause injury when they arrested Zachary and took him into custody, so Defendants are entitled to summary judgment based on official immunity as to Plaintiffs' false imprisonment claims.

4. Assault and Battery

To state a claim for assault, Plaintiffs must show that the conduct of Coats, Hudson and Touchberry was not justified and that their conduct placed Zachary "in fear of an illegal, unauthorized physical contact." *Gardner v. Rogers*, 224 Ga. App. 165, 169, 480 S.E.2d 217, 221 (1996). To state a claim for battery, Plaintiffs must show that Coats, Hudson and Touchberry "carried out the illegal contact." *Id.* As discussed above, a jury could conclude that Coats, in accordance with the instructions of Hudson and Touchberry, placed Zachary in fear of unauthorized physical contact and then carried out the contact when he intentionally used deadly force against Zachary even though deadly force was not warranted under the circumstances.[25] Therefore, Coats, Hudson and Touchberry are not entitled to state official immunity as a matter of law as to Plaintiffs' assault and battery claims because a jury could conclude that their actions were intentional and carried out with wilfulness or malice, in violation of a known right. *See id.* Their motion for summary judgment on Plaintiffs' assault and battery claims is therefore denied.

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[24] Plaintiffs point to no evidence that either Boren, Hudson, Touchberry, or Coats was involved in the decision to place Zachary under police supervision in the hospital.

5. *Intentional Infliction of Emotional Distress*

"A claim for intentional infliction of emotional distress has four elements: (1) intentional or reckless conduct (2) which is extreme and outrageous and (3) caused the emotional distress (4) which is severe." *Lewis v. Northside Hosp., Inc.*, 267 Ga. App. 288, 292, 599 S.E.2d 267, 270 (2004) (internal quotation marks omitted). As discussed above, a jury could conclude that Coats, Hudson and Touchberry engaged in intentional (or reckless) conduct—shooting or causing

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[25] Again, though Coats contends that he did not intend to hit Zachary in the spleen, he *did* hit Zachary in the spleen, creating a jury question as to whether he intended to do so.

Zachary to be shot in the spleen or center mass with the beanbag munition. Such a shooting, without justification for the deadly force, is sufficiently extreme and outrageous. A jury could conclude that Zachary suffered severe emotional distress; he was in the hospital, conscious and awake for at least part of the two days between the shooting and his death, aware that he had been shot and was severely injured. A jury could also conclude that Coats, Hudson and Touchberry intended to cause Zachary severe emotional distress by shooting him (or directing him to be shot with) the beanbag munition, which was capable of causing severe physical injury or death. Therefore, Coats, Hudson and Touchberry are not entitled to official immunity as a matter of law on Plaintiffs' intentional infliction of emotional distress claim, and their motion for summary judgment on this claim is therefore denied.[26]

CONCLUSION

For the reasons discussed above, the Court grants Defendants' motion for summary judgment as to the following claims:

1. Fourth Amendment unreasonable seizure claim.
2. Fourth Amendment excessive force claim against Chief Boren in his individual capacity.

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[26] To the extent Plaintiffs seek to assert intentional infliction of emotional distress claims against any other individual Defendants, the Court concludes that Plaintiffs have not pointed to enough evidence to overcome official immunity.

3. Substantive due process claim.
4. First Amendment claim.
5. Equal protection claim.
6. Civil conspiracy claim.
7. "Intentional tort" and "malicious negligence" claim.
8. False arrest claim.
9. False imprisonment claim.

The Court denies summary judgment as to the following claims:

1. Plaintiffs' § 1983 claims against Columbus for excessive force.
2. Plaintiffs' § 1983 individual capacity claims against Bolen, Coats, Hudson and Touchberry for excessive force.
3. Plaintiffs' assault and battery claims against Coats, Hudson and Touchberry.
4. Plaintiffs' intentional infliction of emotional distress claims against Coats, Hudson and Touchberry.

CERTIFICATE OF IMMEDIATE APPEAL

In the Court's view, this Order, including the denial of summary judgment as to the officers in their individual capacities, is not directly appealable because genuine issues of material fact must be resolved by a jury before the Court can decide whether the officers are entitled to qualified immunity. *See Breeden*, 280 F.3d at 1317 ("[I]f the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial."). However, pursuant to 28 U.S.C. § 1292(b), the Court finds that Defendants sued in their individual capacities should be permitted to take an immediate appeal on the issue of qualified immunity. The Court is of the opinion that its rulings as to the qualified immunity issues in this case involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order" on the qualified immunity question "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Court further finds that if the Court of Appeals determines that an appeal of the Court's rulings denying qualified immunity to the individual Defendants should be permitted, then judicial economy would be served by also reviewing the Court's ruling denying the City's motion for summary judgment on Plaintiffs' § 1983 excessive force claim.

IT IS SO ORDERED, this 2nd day of December, 2008.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

CASE NO. 4:07-CV-52 (CDL)

[Filed June 23, 2010]

WILLIE L. GLENN (as Personal Representative of the Estate of Lester Zachary), and KAREN ZACHARY (Individually, and As Next Friend of Lester Zachary),

Plaintiffs,

vs.

CITY OF COLUMBUS, GEORGIA/ CONSOLIDATED GOVERNMENT OF COLUMBUS, GEORGIA, *et al.*,

Defendants.

ORDER

The Court previously denied summary judgment as to the following claims:

1. Plaintiffs' § 1983 claims against Columbus for excessive force.

2. Plaintiffs' § 1983 individual capacity claims against Bolen, Coats, Hudson and Touchberry for excessive force.

3. Plaintiffs' assault and battery claims against Coats, Hudson and Touchberry.

4. Plaintiffs' intentional infliction of emotional distress claims against Coats, Hudson and Touchberry.

The Eleventh Circuit Court of Appeals reversed the Court's denial of qualified immunity to Defendants Bolen, Coats, Hudson and Touchberry on Plaintiffs' § 1983 excessive force claims. The Court of Appeals did not expressly decide whether the remaining claims should proceed to trial, but Defendants contend that they are entitled to judgment as a matter of law on the remaining claims in light of the Eleventh Circuit's qualified immunity opinion. For the reasons set forth below, the Court agrees.

DISCUSSION

The Court previously found genuine issues of material fact on Plaintiffs' § 1983 excessive force claim against Columbus because the Court concluded that jury questions existed on (1) whether the officers used deadly force when they deployed a beanbag munition against Lester Zachary and (2) whether the officers had probable cause to use deadly force. *Glenn v. City of Columbus, Ga.*, No. 4:07-CV-52 (CDL), 2008 WL 5115032, at *12-*13 (M.D. Ga. Dec. 2, 2008) [hereinafter District Ct. Order]. The Court further concluded that Columbus could be held liable for the officers' acts because the Court found that a jury could conclude that Columbus's "Less Lethal Munitions" training disregarded a risk of serious harm. *Id.* at *14.

In its qualified immunity decision, the Eleventh Circuit concluded that, in this case, the beanbag munition was not deadly force; instead, it "lies in the unwashed middle somewhere between deadly force and the use of a Taser gun." *Glenn v. City of Columbus, Ga.*, No. 09-11078, 2010 WL 1558721, at *5 (Apr. 20, 2010) (per curiam) [hereinafter 11th Cir. Op.]. The Eleventh Circuit further concluded that the use of force was reasonable under the circumstances because the officers "used force to prevent threatened harm to a child," against Mr. Zachary himself, or against Mr. Zachary's companion, noting that "the officers reasonably believed on the basis of the [Mr. Zachary's] threats that he was equipped to commit and had contemplated homicide as well as suicide." *Id.* The Eleventh Circuit also noted that although "the officers received some information that may have mitigated Zachary's threats to shoot himself or the police, the officers also received substantial corroboration that the situation was fraught with grave danger that Zachary would use deadly force." *Id.* at 6. Finally, the Eleventh Circuit found that Defendant Bolen, who created the Columbus policy on using the beanbag munition, was entitled to qualified immunity on Plaintiffs' excessive force claims based on creation of that policy. *Id.* at 7.

Although this Court finds the holding and rationale of the Court of Appeals to be remarkably charitable to law enforcement officers who used deadly force against an unarmed man under dubious circumstances, the

Court of Appeals's holding and rationale lead to the inescapable, albeit perhaps puzzling, result that if the Court of Appeals had to decide the remaining claims in this case, it would find that they fail as a matter of law. Duty bound to follow the dictates of the Court of Appeals, the Court therefore finds in favor of Defendants on the remaining claims for the following reasons. First, regarding the federal law claims against the City of Columbus, although the holding of the Eleventh Circuit's opinion focused upon the qualified immunity issue, the opinion suggests in much broader terms that the Eleventh Circuit found the use of force was reasonable under the circumstances and, therefore, no constitutional violation occurred. Second, the Eleventh Circuit's opinion contemplates that, even if a constitutional violation occurred, the beanbag munition policy cannot be a basis for municipal liability because the Eleventh Circuit concluded that the policymaker was entitled to qualified immunity on Plaintiffs' claims against him, suggesting that the training could not amount to a deliberate indifference to the rights of persons with whom the officers using the beanbag munition come into contact.

As to Plaintiffs' state law claims, this Court concluded that a jury could conclude that the individual Defendants "acted in a wilful or wanton manner; with actual malice; or with the actual intent to cause injury." District Ct. Order, 2008 WL 5115032, at *19. This conclusion was based on the Court's determination that a jury could find that the officers used deadly force even though deadly force was not authorized under the circumstances. However, as discussed above, the Eleventh Circuit concluded that the force used was reasonable under the circumstances, so this Court must now find that Plaintiffs cannot establish their state law claims because Defendants are entitled to official immunity. Thus, Plaintiffs' state law claims fail.

CONCLUSION

For the reasons set forth above, the Court concludes that, in light of the Eleventh Circuit's qualified immunity decision, Defendants are entitled to summary judgment as to all of Plaintiffs' remaining claims. Accordingly, summary judgment is hereby entered in favor of Defendants.

IT IS SO ORDERED, this 23rd day of June, 2010.

S/Clay D. Land
CLAY D. LAND
UNITED STATES DISTRICT JUDGE